IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO JOIN THE CHEROKEE NATION AS A REQUIRED PARTY" [DKT #1788]

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party" [DKT #1788] ("Motion") be denied in its entirety.[1]

I. Introduction

Defendants -- more than *three years* after the State filed this action and *a year and a half* after the Scheduling Order deadline for the joinder of additional parties -- have filed a motion to dismiss for failure to join the Cherokee Nation as a required party. The Court should deny Defendants' dilatory (and unfounded) Motion for the following reasons:

First, Defendants' Motion is based upon the erroneous premise that the Cherokee Nation owns and asserts its sovereign authority over *all* the land, water and other natural resources of the Illinois River Watershed (the "IRW") in Oklahoma, and that it does so *to the exclusion of the State*.

Second, Defendants have not carried their burden in establishing that the Cherokee Nation "claims an interest relating to the subject of the action" such that it is a necessary party under Rule 19(a). The subject of the State's action is the pollution by Defendants of the land, water and other natural resources of the IRW in Oklahoma. It is not an action to quiet title to the land, water or other natural resources of the IRW in Oklahoma. As such, the Cherokee Nation is not a necessary party under Rule 19(a).

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[1] Defendants' Motion was originally styled as "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing." *See* DKT #1788. As it was a multi-part motion, the Court split it into two motions, with "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party" maintaining DKT #1788, and "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing" becoming DKT #1790. *See* DKT #1788 & #1790. Accordingly, the State is responding separately to these two motions. In order to minimize duplication, however, the State does incorporate by reference its Response in Opposition to "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing."

Third, even assuming arguendo that Defendants were to have carried their burden in establishing that the Cherokee Nation claims an interest relating to the subject of the action, Defendants have not established, as is their burden, that the Cherokee Nation in fact claims an *exclusive* interest in *all* the land, water and other natural resources of the IRW in Oklahoma, let alone an interest that would preclude the State from prosecuting this action for injuries to these natural resources. As such, the Cherokee Nation is not a necessary party under Rule 19(a).

Fourth, again assuming arguendo that Defendants were to have carried their burden in establishing that the Cherokee Nation claims an interest relating to the subject of the action, the nature of the State's claims are such that disposition of the action would neither impair or impede the Cherokee Nation's interests nor leave Defendants subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. As such, the Cherokee Nation is not a necessary party under Rule 19(a).

Fifth, even were it determined that the Cherokee Nation is a necessary party as to some or all of the State's claims under Rule 19(a), equity and good conscience weigh strongly against dismissal under Rule 19(b).[2] Weighing particularly strongly against dismissal are: (1) Defendants' inexplicable delay in bringing their Motion and the fact that Defendants' Motion to dismiss has been brought for defensive purposes rather than to protect Cherokee Nation interests, (2) the fact that to date the Cherokee Nation has not itself taken steps with respect to this action to assert an interest, (3) the fact that a judgment in the State's favor would not prejudice either the Cherokee Nation or Defendants, and (4) the fact that the State would be severely prejudiced.

[2] Inexplicably ignoring the plain language of Rule 41(b), Defendants seek dismissal with prejudice. A dismissal for failure to join a necessary party is *without* prejudice. *See* Fed. R. Civ. P. 41(b).

In short, Defendants' Motion has nothing to do with Defendants wanting to protect Cherokee Nation interests, and everything to do with Defendants simply trying to avoid their liability for polluting the land, water and other natural resources of the IRW. Defendants' Motion should be denied.

II. Background

A. The State's claims against Defendants are to remedy the injuries to the land, water and other natural resources of the IRW in Oklahoma caused by Defendants' pollution-causing conduct

In order to properly evaluate Defendants' Rule 19 Motion, it is first necessary to have a clear understanding of what the State's lawsuit is, and is not, about. The State's lawsuit is about stopping Defendants' current pollution-causing conduct, and remedying the effects of Defendants' historical pollution-causing conduct. The State's lawsuit is not an effort to finally adjudicate what interest or interests the Cherokee Nation may have in the land, water and other natural resources of the IRW in Oklahoma.

The State has asserted ten causes of action against Defendants. *See* DKT #1215. The State seeks, *inter alia,* injunctive relief and damages from Defendants for injuries to natural resources in Oklahoma.[3] *Id.* The State seeks neither damages from, nor an injunction against, the Cherokee Nation. Nor does it seek to regulate the conduct of any member of the Cherokee Nation.

[3] Defendants incorrectly assert that the State is seeking "monetary damages and injunctive relief for alleged environmental injuries to the *entire* million-acre Illinois River Watershed." *See* Motion, p. 1 (emphasis in original). As is clear in the Second Amended Complaint, DKT #1215, the State is seeking damages and relief to address the injured natural resources located *within the Oklahoma portion of the IRW*. The State is not seeking damages and relief to address injured natural resources located within the Arkansas portion of the IRW.

The State asserts its claims in this lawsuit pursuant to its sovereign, quasi-sovereign / parens patriae, trustee and / or property interests. *See, e.g.,* Second Amended Complaint, ¶¶ 5, 78 & 119 [DKT #1215]. Notably, actual ownership by the State of the natural resources in the IRW is not a prerequisite for *any* of the State's claims. Further, with the exception of the State's trespass claim, the State need not even have a possessory interest in the natural resources to prosecute its claims -- and even then the State's interest need not be an exclusive possessory property interest.

B. The Cherokee Nation does not have an exclusive interest in all the land, water and other natural resources in the IRW in Oklahoma

The central premise of Defendants' Motion is that the Cherokee Nation has and claims an *exclusive* interest in *all* the land, water and other natural resources in the IRW in Oklahoma, and that the State has *no* legally protected interests in the land, water and other natural resources in the IRW in Oklahoma. To wit, Defendants have variously (mis)stated:

- That "the federal government transferred *all* of the water and other natural resources within the Oklahoma portion of the IRW to the Cherokee Nation before Oklahoma became a state, and those natural resources *remain* the *exclusive* property of the Cherokee Nation today." *See* Motion, p. 4 (emphasis added).

- That "the Cherokee Nation today continues to hold sovereign authority over [the waters, sediments and biota] *to the exclusion of the State*." *See* Motion, p. 10 (emphasis added).

- That "the Cherokee Nation continues to own and to assert its authority over the lands and other natural resources granted by the treaties with the United States, including the natural resources of the IRW." *See* Motion, p. 14.

- And that "the grants to the Cherokee encompass *all* surface water in both navigable and nonnavigable streams within the IRW, groundwater, streambeds, biota, and any lands that are currently, or were historically, submerged." *See* Motion, p. 15 (emphasis added).

The law and the facts, however, do not support Defendants' characterization of the nature and extent of the interests that the Cherokee Nation had or has in the land, water and other natural resources in the IRW in Oklahoma. Indeed, these characterizations are obviously false on their

face. Within the Oklahoma portion of the IRW, there are thousands of privately-owned homes, businesses and farms -- the overwhelming majority of which have no affiliation with the Cherokee Nation. Additionally, there are roads and other facilities built and maintained by the State. There are also people hunting and fishing with licenses issued by the State. And there are cities and towns taking and using water from the Illinois River and Lake Tenkiller pursuant to permits issued by the State. The blanket assertion that the Cherokee Nation owns and has sovereignty over the land, water and other natural resources of the IRW to the exclusion of the State is betrayed by simple observation and common sense. Moreover, it demonstrates a profound ignorance of the history of the dealings between the Congress and the Cherokee Nation after the 1830s.

1. The Cherokee Nation does not own all of the land, water and other natural resources

Defendants' assertion that "*all* of the water and other natural resources within the Oklahoma portion of the IRW . . . *remain* the *exclusive* property of the Cherokee Nation today," Motion, p. 4 (emphasis added), is not only inconsistent with statements Defendants made in the *City of Tulsa* litigation,[4] but also ignores the historical facts. Specifically, it ignores the fact that

[4] In the *City of Tulsa* litigation Defendant Cargill, Inc. stated that "[t]he State of Oklahoma is *the owner* of Spavinaw Creek, and thereby, the water that flows into Lakes Eucha and Spavinaw." *See* Ex. 1, p. 4, ("Motion of Separate Defendant Cargill, Inc. and Brief in Support of Supplemental Motion for Partial Summary Judgment," DKT #238) (emphasis added). And the other Defendants stated that "Tulsa does not own Lake Eucha and Spavinaw, *the State of Oklahoma does*." *See* Ex. 2, p. 22 ("Poultry Defendants' Reply to Plaintiffs' Response to Poultry Defendants' Motion for Summary Judgment or in the Alternative for Partial Summary Judgment," DKT #282); Similarly, counsel for the Tyson Defendants stated that "[t]he water is *owned by the State of Oklahoma*. . . . This lawsuit is brought over a body of water, or waters I should say, Spavinaw and Eucha, that are *owned by the State of Oklahoma* . . . ." *See* Ex. 3, pp. 110-114 (Jan. 3, 2003 Hearing Transcript, in *City of Tulsa*) (emphasis added); *see id.* at 117-19 (counsel for Cargill and the other defendants making similar statements). Both the Eucha-Spavinaw Watershed and the IRW are within the historical boundaries of the Cherokee Nation. Thus, with respect to the issue of State interests in water, Spavinaw Creek and Lakes

the vast majority of lands comprising the original Cherokee Nation grant were allotted pursuant to the Cherokee Allotment Act of 1902, 32 Stat. 716, and subsequently alienated.[5] It also ignores the fact that whatever water rights the Cherokee Nation had under the original Cherokee Nation grant were subsequently converted to riparian interests by virtue of the Organic Act of 1890, by which Congress provided for the adoption of Chapter 20 of the Mansfield Digest of the Statutes of Arkansas, which included the common law of England, as the law in Indian Territory. *See* 26 Stat. 81. And it ignores the effects of the equal footing doctrine, which the State was the beneficiary of upon statehood in 1907. *See also* Section III.D.2 of Response in Opposition to "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing."

2. The Cherokee Nation does not exercise exclusive sovereignty over all of the land, water and other natural resources

Defendants assert that "the Cherokee Nation today continues to hold sovereign authority over [the waters, sediments and biota] *to the exclusion* of the State." *See* Motion, p. 10 (emphasis added). It is beyond dispute, however, that the State has historically and currently regulated, controlled and otherwise exercised sovereign / quasi-sovereign authority over land, water and other natural resources of the IRW in Oklahoma. *See, e.g.*, Ex. 4 (Affidavit of J.D. Strong, Oklahoma Secretary of the Environment, establishing the State's regulatory, control and

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Eucha and Spavinaw are similarly situated with the Illinois River and its tributaries and Lake Tenkiller.

[5] As explained in Leslie Hawes, "Indian Land in the Cherokee Country of Oklahoma," *Economic Geography* (Oct. 1942), pp. 401-412, a journal article from 1942: "Most of the land allotted to citizens of the Cherokee Nation has in the short period of three decades passed into the hands of the majority white population. . . . The rate of loss has been least in the eastern, or Ozarkian, section. Even here, the restricted Indians retain only a little over one-third the acreage allotted to them about a third of a century ago." In the subsequent 60 years that percentage has decreased significantly. Indeed, as of 1986, of the original conveyance of seven million acres of land to the Cherokee Nation, only 92,405.97 acres (or less than 2%) remained as Indian Country. *See* Confederation of American Indians, *Indian Reservations: A State and Federal Handbook*, McFarland & Company, Inc., 1986, p. 215.

management functions through, without limitation, the Oklahoma Department of Environmental Quality, the Oklahoma Water Resources Board, the Oklahoma Department of Wildlife Conservation, the Oklahoma Scenic Rivers Commission, the Oklahoma Department of Mines, and the Oklahoma Department of Agriculture, Food and Forestry); *see also* Section III.B of Response in Opposition to "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing" (discussing State's interests in waters of the Arkansas River Basin under the Arkansas River Basin Compact); Section III.D of Response in Opposition to "Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing" (discussion of State's and Cherokee Nation's respective sovereignty interests).

Defendants simply have no authority for the proposition that the Cherokee Nation exercises, or even purports to exercise, exclusive sovereignty over *all* land, water and other natural resources in the IRW *to the exclusion of the State*.

III. Argument

A. Federal Rule of Civil Procedure 19 and its application

Evaluating a motion to dismiss under Rule 19 involves a two step process. First, this Court must determine under Rule 19(a) whether the person is necessary to the action, and second, if the person is necessary to the action and cannot be joined, this Court must then determine under Rule 19(b) whether in equity and good conscience the action should proceed among the existing parties or should be dismissed. *See* Fed. R. Civ. P. 19.

A party is necessary to the action if: "(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave

an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(A) & (B).[6]

Factors to be considered in determining whether in equity and good conscience the action should proceed among the existing parties or should be dismissed if the person is necessary to the action and cannot be joined include: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(1)-(4).

Importantly, the proponent of a motion to dismiss for failure to join a necessary party "has the burden of producing evidence showing the nature of the interest possessed by an absent party and that protection of that interest will be impaired by the absence." *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994) (burden can be satisfied by providing affidavits of persons having knowledge of interests as well as relevant extra-pleading evidence); *see also Augustine v. Adams*, 1997 WL 94263, *3 (D. Kan. Feb. 3, 1997) ("The burden of persuasion rests with defendants, the moving party arguing for dismissal [under Rule 19]").

The Rule 19 inquiry "is not rigid or formulistic, but rather entails a practical examination of the circumstances on a case by case basis." *Picuris Pueblo v. Oglebay Norton Co.*, 228 F.R.D. 665, 667 (D.N.M. 2005).

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[6] Defendants make no claim in their papers that in the absence of the Cherokee Nation this Court cannot accord complete relief among the existing parties.

Finally, it should be noted that "[v]irtually all discussions of the indispensable party issue emphasize that courts are reluctant to dismiss pursuant to Rule 19(b) unless it appears *serious* prejudice will result." *Harran Transportation Co. v. National Trailways Bus System*, 1985 WL 2349, *6 (D.D.C. Aug. 5, 1985) (emphasis added); *see also Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 452 (D.D.C. 1978) ("federal courts have been very reticent to dismiss on the grounds of failure to join an indispensable party, except when serious prejudice or inefficiency will result").

B. Defendants have failed to satisfy their burden under Rule 19(a) for establishing that the Cherokee Nation is a necessary party

1. Defendants have failed to establish that the Cherokee Nation claims an "interest" relating to the subject of this action

"The relevant inquiry for Rule 19(a) is not whether the absent party has an 'interest,' in the broad sense, in the outcome of the litigation, but whether cognizable legal rights of the absent person will be prejudiced by the suit's continuation." *Sac & Fox Nation v. Norton*, 2006 WL 6117555, *6 (W.D. Okla. Nov. 27, 2006). Here, Defendants allege that the Cherokee Nation has an ownership interest claim in all the IRW (that, incidentally, to date has never been formally asserted or defined by the Cherokee Nation) that will be impaired or impeded by this action. Defendants' allegation, however, is untrue. The subject matter of the State's lawsuit is the pollution by Defendants of the natural resources of the IRW. It is not an action to quiet title to the land, water or resources of the IRW. The Cherokee Nation will not gain or lose title to land, water or resources over which it may claim an ownership interest if the Court awards the State the relief it is seeking in this lawsuit. As such, Defendants' claim that the Cherokee Nation is a necessary party under Fed. R. Civ. P. 19(a) must fail because Defendants have not established that the Cherokee Nation "claims an interest relating to the subject of the action."

United Keetoowah Band of Cherokee Indians v. United States, 480 F.3d 1318 (Fed. Cir. 2007), *reh'g en banc denied*, is highly instructive on this point and should guide the Court's analysis of whether the Cherokee Nation claims an interest relating to the subject of the instant action.[7] In *United Keetoowah*, the Keetoowah Band of Cherokee Indians brought an action against the United States seeking compensation for the extinguishment of all right, title and interest to Arkansas Riverbed Lands as permitted under the Cherokee, Choctaw and Chickasaw Nations Claims Settlement Act ("the Settlement Act"), as well as damages for breaches of the federal government's fiduciary duties with respect to Arkansas Riverbed Lands and the minerals therein. The Cherokee Nation moved to intervene for the limited purpose of moving to dismiss the Keetoowah Band's claims pursuant to Rule 19 (something, tellingly, that has not occurred here). The Cherokee Nation advanced two arguments. First, it argued that it is the sole titleholder of all Arkansas Riverbed Lands identified in the Settlement Act, and therefore it was a necessary and indispensable party to the Keetoowah Band's action. Second, it argued that the Keetoowah Band's claims were essentially claims against the Cherokee Nation over which the court had no jurisdiction because of the Cherokee Nation's sovereignty. The court granted the motion and the Keetoowah Band appealed. The Federal Circuit reversed.

The Federal Circuit concluded that the lower court had erred in beginning its analysis by characterizing the Cherokee Nation's "interest." *Id.* at 1325. The Federal Circuit explained:

> Rule 19(a)(2) requires that the "interest" claimed by the absent party "relat[e] to the subject of the action." Thus, the proper analysis to determine whether an absent party has an "interest" under Rule 19(a)(2) sufficient to permit intervention in a pending action must begin by correctly characterizing the pending action between those already parties to the action. Hence, our analysis under Rule 19(a)(2) begins by characterizing the [Keetoowah Band's] action because it is the

[7] Reflective of just how weak their argument really is, Defendants *repeatedly* cite and rely upon the reversed -- and analytically flawed -- lower court decision in *United Keetoowah* in their Motion.

> [Keetoowah Band's] action that is "the subject of the action" in which the [Cherokee Nation] must have an "interest."

Id. at 1326. Applying this analysis to the facts, the Federal Circuit found that the subject matter of the action was extinguishment of the Keetoowah Band's claims which occurred by virtue of the federal government's enactment of the Settlement Act and for which the Keetoowah Band seeks compensation from the federal government. *Id.* It was not, as the Cherokee Nation has contended (and as the trial court had found), an action to establish title to Arkansas Riverbed Lands themselves. Rejecting the lower court's conclusion "that because the [United Keetoowah] claimed an interest in the same Riverbed Lands to which the [Cherokee Nation] claimed exclusive title, the action could adversely affect the [Cherokee Nation's] ability to exercise sovereignty over the Riverbed Land," *id.* at 1235, the Federal Circuit held:

> As we find that the "subject" of the [United Keetoowah's] action is limited to claims permitted under the Settlement Act, we consequently find that the [Cherokee Nation] does not have "an interest relating to" the [United Keetoowah's] statutory claims. The "interest" the [Cherokee Nation] alleges and that it claims is "related" to the subject matter of the [United Keetoowah's] statutory action is its interest in retaining its alleged exclusive rights to the Riverbed Lands. However, the [Cherokee Nation's] "interest" in retaining exclusive rights to the Riverbed Lands is an "indirect" and a "contingent" interest to the [United Keetoowah's] statutory claims against the federal government. *See Am. Mar. Transp.*, 870 F.2d at 1561. The [Cherokee Nation] will not "gain or lose" title to lands that it alleges ownership over if the trial court awards the [United Keetoowah] monetary damages under the Settlement Act.

Id. at 1326-27.

Such is precisely the situation here. Assuming arguendo that Defendants' characterization of the Cherokee Nation's claims in the lands, waters and other natural resources of the IRW in Oklahoma were correct, there is no avoiding the fact that the State's action is not an action to quiet title to these lands, waters or other natural resources. Rather it is an action between the State and Defendants for pollution of these resources. Just as the lower court in

United Keetoowah erroneously concluded that because the United Keetoowah claimed an interest in the same lands to which the Cherokee Nation claimed exclusive title, that action could adversely affect the Cherokee Nation's ability to exercise sovereignty over the lands, Defendants erroneously assert because the State claims an interest in lands, waters and other natural resources which the Cherokee Nation are asserted to be claiming exclusive title, this action could adversely affect the Cherokee Nation's ability to exercise its sovereignty. Simply put, resolution of this action between the State and Defendants will not result in the Cherokee Nation either gaining or losing title to land, water or other natural resources over which it may allege an ownership interest. Therefore, for the same reasons set forth by the Federal Circuit in *United Keetoowah*, Defendants have not established that the Cherokee Nation "claims an interest relating to the subject of the action."

Moreover, as detailed below, this case has been pending for more than three years, yet to date the Cherokee Nation has not come forward and asserted an interest. In *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (9th Cir. 1983), the court held that the absent party -- the United States government -- was not necessary within the meaning of Rule 19 in part because the government "has never asserted a formal interest in either the subject matter of this action or the action itself. On the contrary, the record reflects that the Government has meticulously observed a neutral and disinterested posture . . . ." This fact should certainly not be lost on the Court in evaluating whether the Cherokee Nation "claims an interest relating to the subject of the action."

In sum, the Cherokee Nation is not a necessary party, and the Rule 19 analysis can end here.

2. Defendants have not established, as is their burden, that the Cherokee Nation in fact claims an *exclusive* interest in the land, water and other natural resources of the IRW in Oklahoma

As noted above, the proponent of a motion to dismiss for failure to join a necessary party "has the burden of producing evidence showing the nature of the interest possessed by an absent party and that protection of that interest will be impaired by the absence." *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 17 F.3d at 1293. Thus even assuming arguendo that the Court were to conclude that the Cherokee Nation "claims an interest relating to the subject of the action," that interest needs to be characterized for purposes of determining whether the Cherokee Nation is a necessary party.

In *Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Tenth Circuit reversed a Rule 12(b)(7) dismissal on ground that the evidence provided by the movant -- a letter from the Bureau of Indian Affairs stating the Bureau's position that the Potawatomi tribe and Absentee-Shawnee tribe "share a common former reservation" -- failed to sustain the movant's burden of producing evidence showing nature of the purported necessary party's interest in the land at issue. *Id*. The situation here is similar. The sum and substance of Defendants' evidence in support of their Motion are two 2004 letters from the Cherokee Nation addressed not to the State but rather to a third party, the United States Army Corps of Engineers. *See* Motion, Exs. 7 & 8. All that can be gleaned from these letters is that an employee of the Cherokee Nation has stated that the Nation "has water rights that existed before Oklahoma became a state," *see* Motion, Ex. 8, which is not definitive at all. The statement neither characterizes the extent of the Cherokee Nation's claimed water rights, nor states that the claimed water rights are exclusive. Thus, it does not support Defendants' assertion that the Cherokee Nation claims all the water or that its water rights are exclusive. Moreover, Defendants have come forward with no evidence of the

nature of the Cherokee Nation's claimed interest in the lands and other natural resources in the IRW in Oklahoma. Because Defendants have failed to satisfy their burden under Rule 19 of showing the nature of the interest the Cherokee Nation claims in the land, waters and other natural resources of the IRW in Oklahoma, Defendants have not established that the Cherokee Nation is a necessary party.

3. Disposition of the action without the presence of the Cherokee Nation would not as a practical matter impair or impede any Cherokee Nation interests

There is extraordinary irony in the fact that the polluters of the IRW are now trying to cast themselves as the champions of the Cherokee Nation's sovereignty over the watershed. Defendants' self-serving assertions that disposition of this action without the presence of the Cherokee Nation would as a practical matter impair or impede the Cherokee Nation's interests do not stand up to scrutiny and should not be credited.

Specifically, Defendants have offered *no* evidence that an award of damages from Defendants to the State in this lawsuit would as a practical matter interfere with or impair any Cherokee Nation interest. Likewise, Defendants have offered *no* evidence that the injunctive relief the State seeks against Defendants would as a practical matter interfere with or impair any Cherokee Nation interest. For instance, Defendants fail to explain how one of the primary forms of injunctive relief the State is seeking -- a ban on Defendants' disposal of poultry waste on land in the IRW in Arkansas and Oklahoma -- would in any way implicate, let alone impair or impede, Cherokee Nation sovereignty concerns.

In fact, it is telling that this action has been pending for more than three years and widely reported on in the media, but the Cherokee Nation *itself* has to date not seen it necessary to take steps to move to dismiss or otherwise raise sovereignty concerns. Thus, it can reasonably be

assumed that as a practical matter the Cherokee Nation does not see this action impairing or impeding any interests the Cherokee Nation may have in the land, water or other natural resources of the IRW in Oklahoma. Indeed, both the State and the Cherokee Nation have a shared desire to stop Defendants' pollution. Their interests are aligned, and far from impairing or impeding the Cherokee Nation's interests, the State's action would actually advance any interests the Cherokee Nation may have in the land, water or other natural resources of the IRW in Oklahoma.

Moreover, as pointed out above, the State's action is not an action to quiet title to the land, water or resources of the IRW. The State is not seeking a judgment against the Cherokee Nation. The Cherokee Nation will not gain or lose title to land, water or resources over which it may allege an ownership interest if the Court awards the State the relief it is seeking in this lawsuit.

In sum, Defendants have failed to establish that the Cherokee Nation is a necessary party under Rule 19(a) by virtue of the fact that disposition of the State's action without the presence of the Cherokee Nation would as a practical matter impair or impede any Cherokee Nation interests.

4. Disposition of the action without the presence of the Cherokee Nation would not leave Defendants at a substantial risk of incurring double, multiple or otherwise inconsistent obligations

Defendants contend that disposition of the action without the presence of the Cherokee Nation would leave Defendants at a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Defendants, however, have come forward with no evidence that this is anything other than pure speculation. As explained by the Tenth Circuit in *Sac & Fox Nation of Missouri v. Norton*, "'[t]he key is whether the possibility of being subject to multiple obligations

is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria.'" 240 F.3d 1250, 1259 (10th Cir. 2001) (*quoting* Wright, Miller & Kane, 7 Federal Practice & Procedure § 1604) (finding that "nothing in the record indicates the possibility of additional lawsuits involving this same subject matter").

A closer look at the facts confirms that Defendants' concerns are unsubstantiated and speculative. First, the relief being sought by the State will remedy the pollution at issue and thus, assuming arguendo it were to have an interest, would obviate the need for the Cherokee Nation to sue Defendants to address Defendants' pollution-causing conduct. Second, although the State's case has been pending for more than three years, the Cherokee Nation has not indicated that it intends to sue Defendants. Third, even speculating that the Cherokee Nation was to sue Defendants, there is no reason to believe that the injunctive relief that the Cherokee Nation would seek and receive would be any more stringent from what the State is seeking. And fourth, CERCLA precludes double recovery of natural resource damages. *See* 42 U.S.C. § 9607(f)(1) ("There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource"). In short, Defendants have failed to carry their burden of establishing a real and substantial risk of incurring double, multiple or otherwise inconsistent obligations.

C. Even assuming arguendo that the Cherokee Nation were a necessary party under Rule 19(a), Defendants have failed to satisfy their burden under Rule 19(b) for establishing that in equity and good conscience dismissal of some or all of the State's claims would be appropriate

As noted above, factors to be considered in determining whether in equity and good conscience the action should proceed among the existing parties or should be dismissed if the person is necessary to the action and cannot be joined include: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2)

the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(1)-(4). "Rule 19(b) analysis requires that the factors be evaluated in a practical and equitable manner, and be given the appropriate weight." *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 94 F.3d 1407, 1412 (10th Cir. 1996). The factors listed in Rule 19(b) are not exclusive. *See Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003).

1. Defendants' Rule 19 Motion to dismiss is untimely

In light of the delay in, as well as the reason for, Defendants bringing their Rule 19 Motion, equity and good conscience require that the Motion be denied. First, Defendants waited more than three years after the filing of the State's action to bring the Motion.[8] Second, Defendants' Motion is not based upon any newly-discovered evidence. Third, Defendants have offered no explanation justifying their delay in bringing the Motion. Fourth, Defendant's Motion has been brought for defensive purposes rather than to protect Cherokee Nation interests. And fifth, under the Scheduling Order the deadline for joining additional parties has long since passed. In short, Defendants' Motion is pure eleventh-hour gamesmanship -- a last-ditch, desperate effort to derail the State's lawsuit. Under the foregoing circumstances, denial of the motion is clearly appropriate. *See, e.g.,* Advisory Committee Notes to 1966 Amendments to Rule 19 ("when the moving party is seeking dismissal in order to protect himself against a later

[8] Defendants have as much as admitted that they have sat on their hands with respect to this Motion, stating that "since the inception of this suit, Defendants have put Plaintiffs [sic] on notice that the Cherokee Nation's interests would be at issue." *See* DKT #1797, p. 6 (Defendants' Response in Opposition to Plaintiffs' [sic] Motion for Additional Time to Respond to Defendants' Motion to Dismiss").

suit by the absent person (subdivision 19(a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision 19(a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion"); *Fireman's Fund Insurance Co. v. National Bank of Cooperatives*, 103 F.3d 888, 896 (9th Cir. 1996) ("The Committee Note to Rule 19 . . . indicates that the district court has discretion to consider the timeliness of [a motion to dismiss for failure to join a party] if it appears that the defendant is interposing that motion for its own defensive purposes, rather than to protect the absent party's interests"); *Ilan-Gat Engineers, Ltd. v. Antigua International Bank*, 659 F.2d 234, 242 (D.C. Cir. 1981) ("[T]he defendants' failure to make a timely [Rule 19] motion should have been considered in weighing the extent to which the defendants would be prejudiced by separate actions. . . . Such motions should be made early in the proceedings, and, though the motion is not automatically waived when not made in a responsive pleading, a court should, 'in equity and good conscience,' consider the timing of the motion, and the reasons for the delay, in weighing the prejudice to the moving party"); *Northeast Drilling, Inc. v. Inner Space Services, Inc.*, 243 F.3d 25, 36-37 (1st Cir. 2001) (affirming district court's denial of Rule 19(a) motion to join a necessary party where defendant did not ask court for leave to modify scheduling order or articulate any good cause to excuse the belated filing).

2. A judgment rendered in the absence of the Cherokee Nation will not prejudice the Cherokee Nation

As explained in section III.B.3 above, Defendants have failed to establish that disposition of the State's action against Defendants without the presence of the Cherokee Nation would as a practical matter impair or impede any Cherokee Nation interests. For similar reasons, a judgment rendered in the absence of the Cherokee Nation will not prejudice the Cherokee Nation.

Specifically, Defendants have come forward with no evidence that a judgment granting the State damages against Defendants would in any way abrogate the Cherokee Nation's laws, ordinances or procedures. In fact, as a potential co-trustee under CERCLA, the Cherokee Nation could participate in designing programs funded by the State's CERCLA natural resources damages recovery. Nor have Defendants come forward with any evidence that a judgment granting the State injunctive relief against Defendants (*e.g.*, ordering Defendants to properly dispose of their poultry waste) would in any way abrogate the Cherokee Nation's laws, ordinances or procedures. Further, the State and the Cherokee Nation have a shared desire for land, water and other natural resources that are not polluted. As such, their interests are aligned. *Davis*, 343 F.3d at 1291-92 ("We note that in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected").

Finally, even assuming arguendo that tribal sovereignty concerns were implicated -- which they are not -- the Tenth Circuit has not held that "[tribal sovereign] immunity is so compelling by itself as to eliminate the need to weigh the four Rule 19(b) factors." *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1991). Nor has the Tenth Circuit "said [or] implied that cases *must* be dismissed whenever a tribe's sovereign immunity prevents it from being joined." *Id.* at 961 (emphasis in original).[9]

3. A judgment rendered in the absence of the Cherokee Nation will not unfairly prejudice Defendants

[9] Defendants rely on *Republic of the Philippines v. Pimentel*, ___ U.S. ___, 128 S.Ct. 2180 (2008). This case, however, is readily distinguishable on ground that it involves foreign sovereign immunity rather than tribal sovereign immunity, and that the entities claiming sovereign immunity, unlike the situation here, had *themselves* raised the claim of prejudice. In contrast, the Cherokee Nation has not asserted sovereign immunity in this action.

Defendants, as explained in section III.B.4 above, have failed to identify any likely unfair prejudice they would suffer if a judgment is rendered in the absence of the Cherokee Nation. All Defendants can to do is talk in vague generalities -- generalities that ignore that there will be no need for the Cherokee Nation to sue Defendants if the State receives the injunctive relief it seeks and that CERCLA natural resource damages law precludes double recoveries.

4. Any prejudice that the Cherokee Nation or Defendants might face could be lessened or avoided by protective provisions in the judgment, by the shaping of relief or other measures

Even were there any sovereignty concerns with respect to the Cherokee Nation, those concerns could be addressed by the Court making clear in its judgment that it was not ruling on the issue of the extent, if any, of the Cherokee Nation's ownership of or sovereignty over the land, water and other natural resources in the IRW in Oklahoma.

As to the concerns of Defendants, the Court could make clear in its judgment that section 42 U.S.C. § 9607(f)(1) of CERCLA precluding double recoveries for natural resource damages applies.

5. A judgment rendered in the Cherokee Nation's absence will be adequate

The "adequacy" factor "is intended to address the adequacy of the dispute's resolution." *Davis*, 343 F.3d at 1293. A judgment entered in this action will adequately resolve the dispute at issue here, namely whether Defendants are legally liable for polluting the IRW. The State says that they are. Defendants say that they are not. Should the State prevail at trial, liability for the pollution will be affixed and the judgment will award injunctive relief and damages aimed at resolving the problems caused by Defendants' poultry waste disposal practices. Inasmuch as the

State and the Cherokee Nation both desire an IRW that is not polluted, the judgment will plainly be adequate.[10]

6. If the action were dismissed for nonjoinder, the State would not have an adequate remedy

For the reasons stated above, dismissal of *some* -- let alone *all* -- of the State's claims under Rule 19 would be inappropriate. Assuming arguendo that the Court were to dismiss some or all of the State's claims, however, the State would not have an adequate remedy. Corporate irresponsibility would be sanctioned, and Defendants' pollution of the IRW would continue unabated. The environmental injury and human health threats would worsen with each passing year. Implicitly acknowledging this to be true, Defendants do not even address this Rule 19(b) factor in their papers.

IV. Conclusion

WHEREFORE, in light of the foregoing, "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party" [DKT #1788] should be denied in its entirety.

Respectfully Submitted,

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[10] Moreover, it should not be forgotten that "Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded." *Smith v. United Brotherhood of Carpenters & Joiners of America*, 685 F.2d 164, 166 (6th Cir. 1982).

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE CITY OF TULSA,
THE TULSA METROPOLITAN
UTILITY AUTHORITY,

Plaintiffs,

v.

TYSON FOODS, INC.,
COBB-VANTRESS, INC.,
PETERSON FARMS, INC.,
SIMMONS FOODS, INC.,
CARGILL, INC.,
GEORGE'S, INC.,
CITY OF DECATUR, ARKANSAS,

Defendants.

Case No. 01-CV-0900B(C) EA

Motion of
SEPARATE DEFENDANT CARGILL INC.'S
and **BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW Separate Defendant Cargill, Inc. (hereinafter "Cargill"), and files this Brief in Support of its Supplemental Motion for Partial Summary Judgment, solely as to Plaintiffs' claim of nuisance.

INTRODUCTION

To maintain an action for nuisance, a party must own the property that is subject to the alleged nuisance. Plaintiffs cannot present proof that they are the owners of the property that is subject to the alleged nuisance. The State of Oklahoma owns the property at issue in Plainiffs' nuisance claim, and Plaintiff City of Tulsa is a mere licensee of a portion of that property. Accordingly, Cargill is entitled to summary judgment as to Plaintiffs' claim for nuisance, and for Plaintiffs' claim for joint and several liability as to nuisance.

EXHIBIT 1

STATEMENT OF UNDISPUTED FACTS RELEVANT TO THIS MOTION

1. Cargill, Inc., contracts with independent growers for the raising of poultry. Amended Complaint ¶18; Deposition of Deryle Oxford, May 16, 2002, pp. 14, 88 (Exhibit A).

2. Cargill's contract growers raise poultry on farms owned by the growers. *Id.* at pp. 14, 88, 192.

3. The City of Tulsa asserts in its Amended Complaint that Cargill has caused pollution to the Eucha/Spavinaw watershed, in the form of nutrients that enter streams and tributaries of Spavinaw Creek, as subsequently collected in Lakes Eucha and Spavinaw. Amended Complaint ¶¶ 15, 16, 19, 20, and 21.

4. The Amended Complaint claims a cause of action for nuisance because of alleged pollution by nutrients. Amended Complaint ¶¶ 47-52.

5. The City of Tulsa has a license from the State of Oklahoma to use a defined portion of the waters of Spavinaw Creek. (Permit, Grant, License and Certificate, Oklahoma Planning and Resources Board, *In the Matter of the Application (Amended) and Supplemented, By the City of Tulsa, a Municipal Corporation, For Appropriation of the Waters of Spavinaw Creek*, No. 22-33, August 9, 1938) (Exhibit "B").

6. Plaintiffs are not the owner of the waters of Spavinaw Creek. *Id.*; *City of Tulsa v. Grand-Hydro*, Case No. 5263, District Court of Mayes County, State of Oklahoma, February 10, 1938 (Exhibit "C").

APPLICABLE LAW

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[i]

ARGUMENT

I. The Conduct of Cargill's Contract Growers With Respect to Raising Poultry Does Not Constitute a Nuisance Pursuant to Oklahoma Statute

Oklahoma law defines the raising of poultry as an agricultural activity. 50 O.S. § 1.1. Agricultural activities are specifically exempt from Oklahoma's nuisance law if the activities are performed in a manner that does not have a substantial adverse effect on the public health and safety:

> Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.
>
> If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

50 O.S. § 1.1(B). Cargill's contract growers raise turkeys on farm land. There is no allegation that the contract growers do not utilize good agricultural practices. Under these facts, Cargill's contract growers' agricultural activities "are presumed to be reasonable and do not constitute a nuisance."

The statute excepts from its protection from nuisance suits only those agricultural activities that have "a substantial adverse effect on the public health and safety." Plaintiffs do not allege in the Amended Complaint that the public health and safety is endangered by any action of Cargill or its contract growers.

Furthermore, there is no allegation that Cargill's contract growers are not in conformity with federal, state and local laws and regulations. Without evidence of non-conformity, Cargill's contract growers are presumed by statute to be engaging in "good agricultural practice" and are not "adversely affecting the public health and safety," and thus, their poultry operations cannot constitute a nuisance.

II. Plaintiffs Cannot State a Cause of Action for Nuisance Because Plaintiffs Do Not Have the Requisite Interest In Property

A. The State Of Oklahoma Is the Owner of Spavinaw Creek, and Thereby, the Water That Flows Into Lakes Eucha and Spavinaw

Neither Plaintiff owns the water in Lake Eucha or Lake Spavinaw. The City of Tulsa has permission from the State of Oklahoma to take a certain quantity of water from Spavinaw Creek. The City filed an application with the Oklahoma Planning and Resources Board on May 11, 1922, as amended August 5, 1922, March 23, 1932, and June 13, 1938. (Permit, Grant, License and Certificate, Oklahoma Planning and Resources Board, *In the Matter of the Application (Amended) and Supplemented, By the City of Tulsa, a Municipal Corporation, For Appropriation of the Waters of Spavinaw Creek*, No. 22-33, August 9, 1938)(Exhibit "A")

The City's initial application was to "appropriate the minimum flow" of Spavinaw Creek, and the subsequent amendments expanded the City's request to include "the entire flow of said creek for municipal purposes" and "the excess flow of Spavinaw Creek" for future needs. *City of Tulsa v. Grand-Hydro*, Case No. 5263, District Court of Mayes County, State of Oklahoma, February 10, 1938 at ¶ 1, p. ATK2084 (Exhibit "B"). The City's applications were granted. Id; *see also* Permit, Grant, License and Certificate (reciting history of the construction of Spavinaw reservoir, waterworks and water conduit

to Tulsa) The specific rights of the City of Tulsa to the waters of Spavinaw Creek are as follows:

> IT IS ORDERED AND DECLARED That ... PERMIT, GRANT, LICENSE AND CERTIFICATE is hereby issued to it, its successors, and a grant is made to it, and it is hereby given permission to use and apply forty five cubic second feet of the run-off or flow of said Spavinaw Creek for present needs and necessities for municipal waterworks or supply purposes and such further uses authorized by law...

Id. The Permit, Grant, License and Certificate further finds the City entitled to 205 cubic second feet of Spavinaw Creek for future anticipated needs, "leaving only unappropriated water and water subject to appropriation in the future in said stream system of Spavinaw Creek one hundred fifty-five cubic second feet." *Id.*

The terms used by the Oklahoma Planning and Resources Board are unequivocal: the City was granted license to utilize a certain portion of the flow of Spavinaw Creek. Title and ownership of the water itself did not transfer—only the right to use the water was transferred from the State of Oklahoma.

B. Plaintiffs Cannot State a Claim for Nuisance Because They Do Not Own the Property Subject to the Alleged Nuisance

"A nuisance, public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another." *Fairlawn Cemetery Ass'n v. First Presbyterian Church*, 496 P.2d 1185 (Okla. 1972). Plaintiffs are not the owners of the waters of Spavinaw Creek; they are simply licensees of the State of Oklahoma.

As mere licensees, Plaintiffs cannot enforce the rights of a property owner that is subject to an alleged nuisance.

> The statutory definition of nuisance --in 50 O.S.1991 §§ 1 et seq.— encompasses the common law's private and public nuisance concepts. It abrogates neither action. Common-law nuisance --a field of tort-like liability which allows recovery of damages for wrongful interference with

> the use or enjoyment of rights or interests in land-- affords the means of recovery for damage incidental to the land possessor's person or chattel.

Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 272 (Okla. 1996). The State of Oklahoma is the "possessor" in this case, with the City a licensee for a particular portion of the State's property. The action of nuisance is the "means of recovery for damage incidental" to the property of the State of Oklahoma.

As discussed in the joint Motion for Summary Judgment of the Poultry Defendants, Plaintiffs cannot recover under nuisance for claims of personal injury, such as annoyance and discomfort, because those types of damage can only be suffered by people, not corporate or government entities. Corporate or government entities can only recover for damage to their property. "*Tytenicz*, *Eylar*, *Kiser*, *Slape*, and *Lowe*, make inescapable the conclusion that the cause of action for inconvenience, annoyance, and discomfort is one for personal injury and is separate and distinct than the cause of action for damages to property, although the right to both may arise in a suit for nuisance." *Truelock v. Del City*, 967 P.2d 1183 (Okla. 1998).

C. As Licensees, Plaintiffs Can Only Claim that Cargill Has Interfered With the City's Right To Take Its Assigned Quantity of Water, a Claim That Plaintiffs Do Not Allege

The terms of the City's license with the State do not include provisions relating to any aspect of water other than quantity. Because the license is silent as to issues such as warranties of water quality or clarity, Plaintiffs cannot argue that any contractual rights are injured by virtue of the alleged nuisance. Plaintiff City of Tulsa has a license to use a fixed quantity of water, and Plaintiffs do not allege that Cargill has done any act to interfere with the City's taking of its fixed quantity of water. Thus, even if Plaintiffs could sustain a nuisance claim as to property that they do not own, Plaintiffs can allege

only that harm commensurate with the City's license to utilize water as licensed by the State.

CONCLUSION

Plaintiffs allege numerous causes of action with respect to their basic complaint: the water they take from Lakes Eucha and Spavinaw has more algae in it than usual. Plaintiffs' allegation of nuisance against Cargill fails for multiple reasons. The agricultural practices of Cargill's contract growers are protected from nuisance claims by statute. Furthermore, Plaintiffs do not have the right to assert an action for nuisance to property that is not theirs.

WHEREFORE Defendant Cargill, Inc. respectfully requests that the Court grant summary judgment to Cargill, Inc. as to Plaintiffs' claim for nuisance, and for Plaintiffs' claim for joint and several liability as to nuisance, and for such other relief as the Court finds appropriate.

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[1] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *LMS Holding Co. v. CoreMark Mid-Continent, Inc.*, 50 F.3d 1520, 1523 (10th Cir. 1995). Indeed, the purpose of the summary judgment rule is to determine whether trial is necessary; thus the non-moving party must at a minimum direct the court to facts which establish a genuine issue for trial. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). In *Celotex*, the Supreme Court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 317. To survive a motion for summary judgment, the nonmovant must establish that there is a genuine issue of material fact, but he also "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

With respect to Rule 56 motions, the Tenth Circuit Court of Appeals has stated:

> Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . . We view the evidence in a light most favorable to the nonmovant; however, it is not

> enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.'
>
> . . .
>
> A movant is not required to provide evidence negating an opponent's claim . . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in the possession of the movant.

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992) (citations omitted). Thus, if the non-moving party fails to set forth specific facts showing a genuine issue for trial, the moving party is entitled to judgment as a matter of law, and the court's grant of summary judgment will not be disturbed on appeal. *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 726-27 (10th Cir. 1991).

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER & GABLE, P.L.L.C.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of November, 2002, mailed a true and correct copy of the above and foregoing document with proper postage prepaid thereon to:

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1790-1

EXHIBIT
A

Transcript of the Testimony of
Deryle Oxford

Date: May 16, 2002
Volume: I

Case: City of Tulsa v. Tyson, et al.
01-CV-0900B(X)

COPY

City Reporters, Inc.
Phone: (405) 235-3376
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Internet: www.okcityreporters.com

A I communicated with a Tim Alsup.
Q All right. Tim Alsup.
What does Tim Alsup do for Cargill, Inc.?
A He has worked with the producers in the past, but currently works a lot like Tim Mothen, except in the northwest Arkansas area.
Q All right.
A But he was more importantly responsible for putting together much of the information that we needed for this, for your request.
Q Okay. Mr. Alsup helped pull together some documents that Cargill, Inc. produced to the plaintiffs in this lawsuit?
A Yes, sir.
Q You said that Mr. Alsup used to work with the producers, quote-unquote?
A Yes, sir.
Q What -- when you use the word "producers", what are you referring to?
A The people that grow the turkeys.
Q All right.
A The independent farmers.
Q Okay. Mr. Alsup was some kind of supervisor there with the independent growers?
A That's what we call grow-out manager.

Q All right. Is that written down somewhere what your minimum requirements are?
A In some locations it's written down. I -- I don't think it is in all locations.
Q How about your location? Do you have -- you're the supervisor. Do you have a book or something that writes down kind of generally what you're expecting the farmer to -- to invest in the operation as time goes along? Are you following what I'm saying?
A We don't have an estimate of how much he should invest as time goes on.
Q Do you have a minimum requirement as time goes on?
A No, sir. Just to have the houses maintained at a certain level.
Q If the farmer wants to sell his farm to another grower, is that normally what happens, if they want to get out of the business? They want to sell it to some other grower?
A Certainly.
Q Okay. And how does that process work? Do they contact you and say, I want to sell my farm to Johnny Jones?
A It happens in all sorts of ways. Sometimes

with the litter, why Cargill, Inc. wouldn't do that? Is that a bad question? Do you want me to start --

A It was a long one, but --

Q Yeah, I'm bad at that. Let me start over.

Cargill, Inc. dictates a lot of specific requirements to contract growers, does it not? Do you agree with that?

A In the management of their farm?

Q Yes.

A I don't know that I agree with you on that.

Q Really? You don't -- you don't think that the contract and the way the process is set up is set up --

A Those -- that doesn't affect the way they manage their farms.

Q The requirements in the contract, what they have to do, the weekly visitations by Cargill, does not affect the management of the farm?

A The weekly -- the weekly visitation is not something we ask the grower to do.

Q I understand, but don't you make requirements of those growers when you see things that are wrong?

A We only make requirements whenever we think that it's going to affect the residues, the rules

EXHIBIT
B

PROCEEDINGS IN APPLICATION
FOR
SPAVINAW WATER RIGHTS

BEFORE THE OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION (AS AMENDED) AND SUPPLEMENTED, BY THE CITY OF TULSA, A MUNICIPAL CORPORATION, FOR APPROPRIATION OF THE WATERS OF SPAVINAW CREEK.	))))	No. 22-33.

PERMIT, GRANT LICENSE AND CERTIFICATE

On the 9th day of August, A.D. 1938, there came on for hearing and consideration before the Oklahoma Planning and Resources Board of the State of Oklahoma (hereinbelow referred to as Commission) at its offices in the State Capitol Building, in Oklahoma City, Oklahoma, the original application of the City of Tulsa, a municipal corporation, filed in the office of the State Engineer, Department of Highways of the State of Oklahoma, on May 11, 1922, and the amended application of said City of Tulsa filed in the same office on August 5, 1922, to which amended application there was appended maps, plans, etc., illustrating the nature of the proposed waterworks to be constructed by said City in its appropriation of the waters of Spavinaw Creek in Oklahoma for municipal waterworks or supply purposes and, the supplemental application of said City filed in the office of the Conservation Commission of the State of Oklahoma on March 23, 1932, and the amendment of said City to said application filed with said Commission on June 13, 1938, all pursuant to and by virtue of the provisions of Chapter 70 of the Oklahoma Statutes 1931 (being Chapter 40, Volume 1, Revised Laws of Oklahoma 1910), and Chapter 119, House Bill No. 63, Session Laws of Oklahoma 1923-1924 (being Sections 6056 to 6059 both inclusive, Oklahoma Statutes 1931), and the said City of Tulsa appearing by H. O. Bland, City Attorney, Harve N. Langley, special assistant to said City Attorney, and W. F. Graham, Water Commissioner of said City, and, whereupon, the said Commission ordered a continuance of said hearing of said matter to September 13, 1938, at 10 o'clock A.M., and further ordered the giving of notice of said hearing on said application, as amended and supplemented, to the Grand River Dam Authority, the Grand-Hydro, a corporation, The City of Muskogee, The City of Wagoner, the City of Pryor Creek, the Town of Ft. Gibson, The Oklahoma Hydro-Electric Company, a corporation, T. C. Bowling, Cedar Crest Lakes, an Oklahoma Express Trust, the City of Vinita, and the City of Miami.

NOW, on this 13th day of September, 1938, at the hour of ten o'clock A.M., at the offices of said Commission, in the State Capitol Building, in Oklahoma City, Oklahoma, the aforesaid application, as amended and supplemented as stated hereinbefore, comes on for hearing and consideration before said Commission, the said City of Tulsa again appearing by H. O. Bland, City Attorney, Harve N. Langley, special assistant to said City Attorney, and W. F. Graham, Water Commissioner of said City, and no person, firm or corporation or municipal corporation appearing in opposition to the granting of said application as amended and supplemented.

Thereupon, the said City of Tulsa files with said Commission due and sufficient proof of the service of the notice issued by said Commission on August 9th, 1938, upon each of the following; The Grand River Dam Authority, The Grand-Hydro, a corporation; The City of Muskogee, The City of Wagoner, The City of Pryor Creek, The Town of Fort Gibson, The Oklahoma Hydro-Electric Company, a corporation, T. G. Bowling, Cedar Crest Lakes, an Oklahoma express trust, The City of Vinita, and the City of Miami, and which service of notice, the said Commission doth approve and declare sufficient.

WHEREUPON, The City of Tulsa, a municipal corporation, submits evidence in support of its said application as amended and supplemented, and, from which evidence, the said Commission finds and declares and adjudges:

(1) That pursuant to the amended application aforementioned filed on August 5th, 1922, The State Engineer, Department of Highways of the State of Oklahoma on the 18th of August, 1922, issued notice of hearing of said amended application, and, which notice was duly published in a newspaper printed in and of general circulation in the stream area, namely, Mayes County Democrat, a weekly newspaper published in the City of Pryor, Oklahoma, in the issues of said newspaper published on dates, i.e., September 14, 1922, and continuing weekly, the last publication being on October 12, 1922, and due proof of such publication filed with said State Engineer immediately upon completion of the last such publication; and, on October 18, 1922, at ten o'clock A.M., at the office of the said State Engineer, in the said State Capitol Building, said application as amended was heard, and the said City of Tulsa submitted evidence, and its specifications and plans for the construction of the works proposed; and by said amended application said City sought to appropriate and did appropriate forty-five cubic second feet of the run-off or flow of said Spavinaw Creek for municipal waterworks or

supply purposes; and, said State Engineer took under consideration said application as amended until the 28th of November, 1922, when he endorsed on the upper right hand corner of the first page of said amended application the following: "Approved for entire flow. 11/28/1922. Max L. Cunningham, State Engr."

Thereupon, in diligent manner, pursuant to such approval of said application as amended, and said appropriation, and in keeping with the maps, plans and specifications so submitted, said City of Tulsa did actually, as a matter of fact, and as a matter of record, appropriate and apply to beneficial uses, i.e., municipal waterworks or supply purposes forty-five cubic second feet of the run-off or flow of said Spavinaw Creek, beginning in the month of April, 1924, after its construction of the proposed works consisting of a dam of reinforced concrete and concrete core-wall located in Section fifteen, Township Twnety-two North, Range twenty-one East of the Indian Base and Meridian, in Mayes County, Oklahoma, said point being definitely located on the map appended to said amended application, which dam raised the elevation of the water from six hundred thirty feet above sea level to the impounded elevation of six hundred eighty feet above sea level, thereby inducing a gravity flow through a reinforced concrete conduit from the point of said dam to a point near the City of Tulsa, and at said latter point said City constructed an emergency storage reservoir, and other appendages and incidents necessary to the plan of the proposed works, and, said City of Tulsa has, for such beneficial purposes, continuously since April, 1924, been diverting and actually applying to such uses, the said appropriated quantity of the run-off or flow of said Spavinaw Creek, i.e., forty-five cubic second feet.

That on March 23, 1932, said City of Tulsa filed with the Conservation Commission of the State of Oklahoma, its supplement to said application for the appropriation of the unappropriated waters of said Creek for such beneficial purposes and uses, pursuant to the provisions of Chapter 119, House Bill No. 63, Session Laws of Oklahoma 1923-24 (being Sections 6056 to 6059, both inclusive, of Oklahoma Statutes 1931) for its future needs and necessities; and, on June 13th, 1938, said City filed a supplement to said application for appropriation for its said future needs and necessities for such purposes of two hundred five cubic second feet of the run-off or flow of said Spavinaw Creek.

That subsequent to March 23, 1932, the Conservation Commission of the State of Oklahoma and this Commission caused to be conducted, and did conduct and complete an hydrographic survey of said Spavinaw Creek and of Grand River in Oklahoma, by which said survey it was accurately determined and recorded the run-off or flow of said Spavinaw Creek.

That on February 14, 1938, the District Court of Mayes County, Oklahoma, in an action entitled: The City of Tulsa, a municipal corporation, plaintiff, versus Grand-Hydro, a corporation, and others, defendants, did render judgment adjudging the run-off or flow of said Spavinaw Creek to be four hundred five cubic second feet, and did further adjudge said Spavinaw Creek to be a separate stream system, and did further adjudge that no person, firm, or corporation, or municipal corporation, save the City of Tulsa, had applied for permit, grant license or certificate to appropriate the waters of said creek to beneficial uses and/or had actually applied the waters of said Spavinaw Creek or any part thereof to beneficial uses.

That on June 13, 1938, the Oklahoma Planning and Resources Board of the State of Oklahoma, issued notice of the hearing of said application, as amended and supplemented as aforesaid of said City of Tulsa, and which said notice was duly published in the Delaware County Journal, published at Jay, the county seat of Delaware County, Oklahoma, being a newspaper published weekly and of general circulation and printed in the stream area of Spavinaw Creek and which said notice was published in the issues of said newspaper to-wit, June 30, 1939, July 7th, July 14th, and July 21, 1938, and due and sufficient proof of said publication filed with said Commission on August 9, 1938.

That the run-off or flow of said Spavinaw Creek as disclosed by said hydrographic survey and the judgment of said District Court, and as a matter of fact, is four hundred five cubic second feet.

The said Spavinaw Creek has its source in Arkansas, and flows through Delaware County, Oklahoma, into Mayes County, Oklahoma, where it empties into Grand River.

That the City of Tulsa, a municipal corporation, is first in point of time in filing application for the appropriation of said forty-five cubic second feet for such uses for present needs, and is first in point of time in filing application for the appropriation of two hundred five cubic second feet for its future needs and necessities for such purposes.

That the City of Tulsa, a municipal corporation, diligently pursued and prosecuted its said application as amended and supplemented as aforesaid, and diligently constructed the works in connection therewith as proposed, and diligently applied the appropriated forty-five cubic second feet of the run-off or flow of said Spavinaw Creek to such uses for present needs and necessities, and, that the works constructed as aforementioned are in accordance with its said plans and specifications, and in keeping with standard engineering, and the same is safe, and should be approved by this Commission, and certificate of completion thereof issued by this Commission.

That to meet the future needs and necessities of said City of Tulsa, it is necessary that said City appropriate in addition to said forty-five cubic second feet of the run-off of said Spavinaw Creek now being actually applied to such uses, two hundred five cubic second feet, for the aforesaid beneficial uses, and that said two hundred five cubic second feet of the run-off or flow of said Spavinaw Creek should be by this Commission or Board set aside as a reserve for said City of Tulsa to be used and applied when needed by said City of Tulsa for such uses.

And, the Oklahoma Planning and Resources Board of the State of Oklahoma, hereinbefore referred to as Commission and Board, being fully informed in the premises:

IT IS ORDERED AND DECLARED That all things have been dine, performed, and happened required by law and the rules of said Board by the City of Tulsa in its appropriation of forty-five cubic second feet of the run-off or flow of said Spavinaw Creek for aforementioned purposes, and PERMIT, GRANT, LICENSE AND CERTIFICATE is hereby issued to it, its successors, and a grant is made to it, and it is hereby given permission to use and apply forty five cubic second feet of the run-off or flow of said Spavinaw Creek for present needs and necessities for municipal waterworks or supply purposes and such further uses authorized by law now existing or hereafter enacted, and the aforementioned works in connection with such appropriation by it constructed and is hereby approved, and declared safe, and declared constructed according to standard engineering, and certification of completion of such works is hereby issued.

IT IS ORDERED AND FURTHER DECLARED That all things have been done, performed and happened required by law and the rules of said Board

by the said City of Tulsa in its appropriation of two hundred five cubic second feet of the run-off or flow of Spavinaw Creek to be by it used and applied in the future to meet its anticipated future needs for such purposes i.e., municipal waterworks or supply purposes and such further uses authorized by law now existing or hereafter enacted, and, said quantity of the run-off or flow of said creek is hereby set apart and reserved for said City of Tulsa for such uses in the future, and permit, grant, license, is hereby issued to said City of Tulsa for such purposes of such quantity of the run-off or flow of said Spavinaw Creek for such future needs and necessities, leaving only unappropriated water and water subject to appropriation in the future in said stream system of Spavinaw Creek one hundred fifty-five cubic second feet.

IT IS ORDERED AND FURTHER DECLARED That the appropriation by the City of Tulsa of the aforesaid two hundred fifty cubic second feet is superior and prior to the Grand River Dam Authority, The Grand-Hydro, a corporation, The City of Muskogee, The City of Wagoner, The City of Pryor Creek, The Town of Fort Gibson, The Oklahoma Hydro-Electric Company, T. C. Bowling, Cedar Crest Lakes, The City of Vinita, and the City of Miami.

WITNESS the Oklahoma Planning and Resources Board of the State of Oklahoma, by its Chairman and Secretary, with the Seal of said Board affixed, at its offices in the State Capitol Building in Oklahoma City, Oklahoma, this thirteenth day of September, A.D. 1938.

THE OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA,

BY /s/ G. W. Archibald
Vice-Chairman

ATTEST:

T. G. Gammie
Secretary

(SEAL)

CERTIFICATE OF TRUE COPY OF ORIGINAL

******

United States of America;)
State of Oklahoma)
Oklahoma County)

The undersigned, whose title is written below his signature, being the officer of the OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA having custody of the records, files and documents of said Board does hereby certify that the foregoing seven typewritten pages is a true and correct copy of the original thereof on file in said Board, the original being the Permit, Grant, License and Certificate issued by said Board to the City of Tulsa, a municipal corporation, in relation to the application as amended and supplemented of said City of Tulsa for the appropriation of the waters of Spavinaw Creek Stream System, being file No. 22-23 of said Board.

Witness the hand of said officer, with the seal of said Board affixed, at his office, in Oklahoma City, Oklahoma, in the State Capitol Building, on this thirteenth day of September, A.D. 1938.

T. G. Gammie

Secretary

(SEAL)

EXHIBIT
C

IN THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

CITY OF TULSA, a municipal corporation,
Plaintiff,
vs. No. 5263
GRAND-HYDRO, a corporation, et al.,
Defendants.

D E C R E E

Now on this 10th day of February, 1938, the above styled cause came on regularly for hearing. The plaintiff appeared by its City Attorney, H. O. Bland, and by special counsel Harve N. Langley; the defendant Grand-Hydro, a corporation, appeared by its president and attorney of record W. E. Hudson; the City of Muskogee, a municipal corporation, appeared through its attorney William Rampendahl; the City of Wagoner, a municipal corporation appeared by its attorney W. O. Mittenhouse; the City of Pryor Creek, a municipal corporation, appeared by its attorney Ernest R. Brown; the Town of Fort Gibson, a municipal corporation, appeared by its attorney, Q. B. Boydston; the Oklahoma Hydro-Electric Company, a corporation, appeared by its attorney Wilbur J. Holleman; the Defendant T. C. Bowling appeared in person; Cedar Crest Lakes Company, an Oklahoma express trust, appeared by its attorney Maurice F. Ellison; the defendant Grand River Dam Authority appeared by its general counsel R. L. Davidson and its associate counsel Jack L. Rorschach; the State of Oklahoma and the Oklahoma Planning and Resources Board appeared through Randell S. Cobb, Assistant Attorney General of the State of Oklahoma; the City of Vinita, a municipal corporation, appeared by its attorney W. T. Rye; the City of Miami was not represented by attorney, having filed an answer that it did not now nor has it at any time past used any of the waters belonging to Grand River or any of its tributaries. All of the parties present announced ready for trial except the defendant Oklahoma Hydro-Electric Company, which asked for a postponement of the trial. The request was withdrawn under an agreement made in open court that after the other parties desiring to introduce evidence had closed their testimony, the

Oklahoma Hydro Electric Company should have the privilege if it so desired at that time, of delaying the trial two days, for the purpose of amending its answer and introducing its evidence. Thereupon, the City of Tulsa, introduced its evidence, after which the defendants the City of Muskogee, The City of Wagoner, the City of Pryor Creek, the Town of Fort Gibson, the Grand-Hydro, Cedar Crest Lakes Company and T. C. Bowling and Grand River Dam Authority introduced their evidence. The introduction of evidence by all parties other than the Oklahoma Hydro Electric Company having been concluded the Oklahoma Hydro-Electric Company claimed its right under the agreement made in open court, to a delay of the trial for two days, which claim the court indicated would be allowed, but it was agreed in open court that further hearing of the cause would be continued until February 12, 1938, at 9:00 a.m., at which time the hearing of the cause would be resumed unless the Oklahoma Hydro- Electric Company at that time was not ready to proceed in which event, the further was to be further continued until February 14, 1938. Prior to convening of the court on February 12, 1938, the Oklahoma Hydro-Electric Company advised the Court that it would not be ready to resume the hearing of the cause on February 12th, but would be ready to resume the same on February 14th. Upon convening of the Court on February 12th, further hearing of the cause was continued by the Court until 5:00 o'clock P.M. February 14, 1938, and the further hearing of the cause was resumed at 5:00 o'clock P.M. on February 14, 1938, and the Oklahoma Hydro-Electric Company introduced its evidence and the Grand River Dam Authority and the Grand-Hydro introduced their rebuttal evidence.

Thereupon, the court having heard all the evidence, and the argument of counsel, and being fully advised in the premises finds and adjudges:

1. That Spavinaw Creek is a separate and distinct stream system from that of Grand River, although it is a tributary of Grand River; that the average flow of Spavinaw Creek is 450 cubic feet per second; that the City of Tulsa has actually appropriated to a beneficial use for municipal purposes, 45 cubic second feet per second of the flow of said creek; that there is now unappropriated in the flow of said creek 405 cubic second feet per second; that the City of Tulsa is diverting from the flow of said creek approximately 45 cubic second feet per second, and conveying the same through a conduit line to the City of Tulsa for municipal purposes; that the point of diversion is at the town of Spavinaw, where the City of Tulsa constructed a dam

impounding approximately 31,000 acre feet of water, and that the diversion of said water actually began in April 1924, which diversion has been continuous ever since; that on May 11, 1922, the City of Tulsa filed its application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek (45 cubic feet per second) to a beneficial use, to-wit; a municipal water supply, and on the 5th day of August, 1922, the City of Tulsa filed its amended application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek for the same purpose; that the State Engineer fixed a day certain for the hearing of said application and amended application, and directed that notice of said hearing to be given as provided by law; that due notice of said hearing was given, and on the 28th day of November, 1922, the State Engineer issued a permit to the City of Tulsa and approved its applications for the appropriation of the entire flow of said creek for municipal purposes; that thereafter the City of Tulsa, on March 23, 1932, filed with the Conservation Commission of Oklahoma an amendment to its applications seeking to appropriate the excess flow of Spavinaw Creek over and above the 45 cubic feet per second already applied for, to meet future needs of the City of Tulsa for waterworks purposes; that no person, firm or corporation, other than the City of Tulsa has ever applied for the right to appropriate the Waters of Spavinaw Creek to a beneficial use, or actually applied the waters of said creek to a beneficial use; that the City of Tulsa has been diligent in the appropriation of said waters for municipal use and purposes and has been diligent in the prosecution of its application for a permit to appropriate said waters for said purpose, and is prior in point of time to other persons, firms and corporations in making application to the proper authorities for such permit.

2. That on the 14th day of July, 1931, the defendant Grand-Hydro a domestic corporation, filed with the Conservation Commission of the State of Oklahoma its application in due form for a permit to appropriate 4,000 cubic feet per second of the flow of Grand River for the purpose of generating electricity energy and power; that the Commission fixed a day certain for the hearing of said application, and directed that notice of said hearing be given as provided by law; that said notice was duly given, and on the 29th day of August, 1931, the said Commission issued to the Grand-Hydro a permit to appropriate to a beneficial use (the generation of electric energy and power)

4,000 cubic feet per second of the flow of Grand River; that under the authority of said approved application, Grand-Hydro proceeded with diligence to acquire one or more dam sites for the purpose of constructing a dam to impound the waters of Grand River for use in the generation of electric energy and power, and in making extensive engineering investigations and surveys, and in the acquisition of lands in the basin area of the reservoir, which would be inundated by the impounded waters, but the Court finds and adjudges that the Grand-Hydro did not construct any works or facilities through which to utilize the waters of said river for the purpose of generating electric energy or for any other beneficial use, and did not actually apply and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to apply or appropriate any of the waters of said river to any beneficial use, but that if Grand-Hydro acquired any rights under its said approved application, it has transferred and conveyed the same to the Grand River Dam Authority by virtue of its assignment of January 10, 1938.

3. The Court further finds and adjudges that on the 20th day of February, 1932, the City of Pryor Creek filed its application with the Conservation Commission of Oklahoma for a permit to appropriate .375 cubic feet per second of the flow of Grand River to meet its present need for municipal waterworks purposes and .75 cubic feet per second of the flow of said river for its future needs; that the Commission fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given, and on the 14th day of April, 1932, the said Commission issued to the City of Pryor Creek its permit to appropriate for municipal purposes .375 cubic feet per second of the flow of said river for its waterworks system and began taking its water supply from Grand River in 1910, and has used the waters of Grand River for that purpose continuously ever since; that the point of diversion is near the northwest corner of Section 12, Township 20 North, Range 19 East, in Mayes County, Oklahoma.

4. The Court further finds and adjudges that on the 29th day of February, 1932, the City of Muskogee filed its application with the Conservation Commission for a permit to appropriate 30 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application and directed that notice thereof be given as provided by law; that such notice was duly given, and

on the 4th day of April, 1932, the said Commission issued to the City of Muskogee a permit to appropriate 30 cubic feet per second of the flow of said river for municipal purposes; that the City of Muskogee began using the water of Grand River for municipal purposes prior to statehood and at statehood was using said waters at the rate of 5 cubic feet per second, and has continuously used the same for such purposes ever since, and is now using the waters of said river for such purpose to the extent of 25 cubic feet per second; that the point of diversion by the City of Muskogee is approximately 1300 feet above the confluence of Grand River with the Arkansas River; that the waterworks system of the City of Muskogee was constructed and operated prior to statehood and has been operated in its present condition since 1913.

5. The Court further finds and adjudges that on March 3, 1932, the City of Vinita filed its application with the Conservation Commission for a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application, and directed that notice be given thereof as provided by law; that such notice was duly given and on the 8th day of April, 1932, said Commission issued to the City of Vinita a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the said City constructed its waterworks system and began the diversion of 5 cubic feet per second of the flow of said river for municipal purposes in 1922, at a point on said river in Section 2, Township 23 North, Range 21 East in Mayes County, Oklahoma, and has ever since continuously used the waters of said river for municipal purposes to that extent.

6. The Court further finds and adjudges that on the 9th day of March, 1932, the City of Wagoner filed its application with the Conservation Commission for a permit to appropriate 4 cubic feet per second of the flow of Grand River for municipal purposes; that the said Commission fixed a day certain for the hearing of said application, and caused notice of said hearing to be given as provided by law, and on the 14th day of April, 1932, said Commission issued to the City of Wagoner a permit to appropriate four cubic feet per second of the flow of Grand River for municipal purposes; that the said City began using said waters of said river for such said municipal purposes

prior to statehood, and at the time of statehood was using said waters at the rate of 2 cubic feet per second for present needs, and has asked in its application for an additional 2 cubic feet per second for its future needs; that the diversion of said waters from said river by the City of Wagoner began in 1903 and has been continuous ever since; that the point of diversion is located 534 feet north and 890 feet east of the southwest corner of the Northwest Quarter (NW¼) of Section 20, Township 18 North, Tange 19 East of the Indian Base and Meridian, in Wagoner County, Oklahoma.

7. The court finds and adjudges that on the 24th day of March, 1932, Cedar Crest Lakes Company, an Oklahoma Express Trust, filed its application with the Conservation Commission for a permit to appropriate 500 acre feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, for the purpose of recreation and fish culture; that the said Commission fixed a day certain for the hearing of said application, and caused notice thereof to be given as provided by law, but that no permit was ever issued to Cedar Crest Lakes Company by the Commission, nor has any further action been taken on said application; that during the year 1932 the Cedar Crest Lakes Company constructed a dam across Spring Creek inundating 110 acres of land located in Section 34, Township 19 North, Range 19 East, and Sections 18 and 19, Township 19 North, Range 20 East, in Mayes County, Oklahoma, and has continuously maintained said dam to this date, and devoted the water thus impounded to recreation and fish culture.

8. The court finds and adjudges that long before statehood the Town of Fort Gibson began using the waters of Grand River for municipal purposes, and on the advent of statehood was using 1.543 cubic feet per second of the flow of said river for such purposes, and is now and has been continuously since statehood, using 1.543 cubic feet per second of the flow of said river for such purposes, but has never filed any application with the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, for a permit to appropriate any of the waters of said River for municipal or other beneficial use; that the point of diversion is located in Section 2, Township 15, North, Range 19 East, in Muskogee County, Oklahoma.

9. The court further finds and adjudges that on June 19, 1922, the Grand River Hydro Electric Company, a corporation, filed its application with the State Engineer for a permit to appropriate the entire flow of Grand River at a point located 1154 feet north and 87 feet west of the Southeast

corner of Section 15, Township 23 North, Range 21 East, in Mayes County, Oklahoma, Dam No. 1, for the purpose of generating electric energy and power; that the State Engineer fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given and on the 23rd day of September, 1922, the State Engineer endorsed on said application his approval thereof; that on June 18, 1923, the Grand River Hydro-Electric Company, a corporation, filed its applications (3) with the State Engineer to appropriate the entire flow of Grand River for the purpose of generating electric energy at three points on the river (for dam No. 2 at a point located 2640 feet north and 1320 feet west of the Southeast Corner of Section 4, Township 21 North, Range 20 East, in Mayes County; and for Dam No. 4 at a point located 2640 feet south and 650 feet West of the northeast corner of Section 22, Township 17 North, Range 19 East, in Cherokee and Wagoner counties); that the State Engineer fixed a day certain for the hearing of said applications, and caused notice thereof to be given as provided by law, and on July 1, 1924, endorsed on said applications his approval thereof; that the Oklahoma Hydro-Electric Company has acquired by mesne assignments and transfers, whatever rights the Grand River Hydro-Electric Company ever had or possessed by virtue of filing of said applications and the State Engineer's approval thereof, but the Court finds and adjudges that neither the Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor any other person, firm or corporation claiming rights under the approved applications of Grand River Hydro-Electric Company, ever constructed any works or facilities through which to use any of the waters of said river for the purpose of generating electric energy or for any other beneficial use; that neither the said Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor any one claiming rights under the approved applications of the Grand River Hydro-Electric Company used due diligence in the appropriation of the waters of said river, to a beneficial use, or used due diligence in prosecuting said applications, or any of them, and that the Grand River Hydro-Electric Company and its assignees, including the Oklahoma Hydro-Electric Company, have abandoned the proceedings instituted by the Grand River Hydro-Electric Company to acquire the right to appropriate the waters of said river to a beneficial use; that the Grand

River Hydro-Electric Company failed to pay its corporation license taxes, for which reason its charter was forfeited by the State in 1934, and it ceased to be a corporation and does not now and has not since 1934 possessed any corporate powers, but the Court finds that before the forfeiture of the charter, the Grand River Hydro-Electric Company assigned and conveyed all of its rights to the persons who later transferred and assigned such rights to the Oklahoma Hydro-Electric Company, and the Court finds and adjudges that the Oklahoma Hydro-Electric Company, has no right to appropriate any of the waters of the Grand River to any beneficial use, and that no person, firm or corporation has any right to appropriate any of the waters of Grand River to any beneficial use under or by virtue of the approved applications of the Grand River Hydro-Electric Company; that if any rights ever existed under said approved applications, they have been abandoned and forfeited and ceased to exist prior to the enactment of Article 4, Chapter 70, of the 1935 Session Laws of the State of Oklahoma, creating the Grand River Dam Authority and appropriating to it the entire flow of the Grand River and conferring upon it the right to control, store, preserve and use the waters of said river for the beneficial purposes specified in said Act.

10. The Court further finds and adjudges that the Oklahoma Hydro-Electric Company has never applied to the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority, for any permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of said waters to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

11. The Court finds and adjudges that the City of Miami has never applied to the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority for a permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

12. The Court finds and adjudges that on September 25, 1931, the defendant T. C. Bowling filed his application with the Conservation Commission for a permit to appropriate 550 acre feet of the flood flow of

Mayes Branch, a tributary of Grand River in Mayes County, Oklahoma, for the purpose of fish culture and irrigation, and on February 20, 1932, the said defendant filed with said Commission an amended application for a permit to appropriate 550 feet of the flow of said Mayes Branch for the same purposes; that the said Commission fixed a day certain for the hearing of said application and amended application, and caused due notice thereof to be given as provided by law; that on March 26, 1932, the said Commission issued to said defendant a permit to appropriate the said 550 acre feet of the flow of Mayes Branch for said purposes; that the said defendant on or about the 26th day of March, 1932, constructed a concrete core wall and earthen dam across said Mayes Branch and inundated about 30 acres of land, and has continuously maintained said dam to this date, devoting the waters so impounded to the culture of fish and the irrigation of shrubbery trees and garden spot on adjacent land.

13. The Court further finds and adjudges that all of said permits for the appropriation of the waters of Grand River and Spavinaw Creek were prematurely issued because no hydrographic survey of the stream system of the Grand River or Spavinaw Creek had ever been made and filed as required by law, and no judicial determination by a court of competent jurisdiction of the appropriated and unappropriated waters of said Grand River or Spavinaw Creek had ever been had; that a hydrographic survey of the stream system of the Grand River was made by the Oklahoma Planning and Resources Board and filed in this cause on February 10, 1938, and that no adjudication by any court of competent jurisdiction of the appropriated and unappropriated waters of the stream system of Grand River has ever been made heretofore; that no vested right to appropriate any of the waters of Grand River to a beneficial use have accrued to any parties to the cause except the Grand River Dam Authority since statehood; that no person, firm or corporation ever appropriated or applied the waters of Grand River or Spavinaw Creek to beneficial use prior to statehood, other than the Town of Fort Gibson to the extent of 1.543 cubic feet per second, the City of Wagoner to the extent of 2 cubic feet per second, and the City of Muskogee to the extent of 5 cubic feet per second; that said three cities have an equal right to use the waters of Grand River for municipal purposes to the extent adjudged herein, which right is prior and superior to the rights of all other parties to that extent.

14. The Court further finds and adjudges that no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Article 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act, including the generation of electric energy, irrigation, recreation and the prevention of damage to persons and property from the flood waters of said river, and operated as an appropriation of all of the waters of Grand River to the Grand River Dam Authority for the purposes therein specified, subject only to the right of the Town of Fort Gibson to use for municipal purposes 1.543 cubic feet persecond of the flow of said river, the right of the City of Wagoner to use 2 cubic feet per second of the flow of said river for municipal purposes, and the right of the City of Muskogee to use 5 cubic feet per second of the flow of said river for municipal purposes, at the points of diversion hereinbefore adjudged; that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the City of Vinita, the City of Pryor Creek, the City of Miami, T. C. Bowling, Cedar Crest Lakes Company, the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Oklahoma Planning and Resources Board, and all other persons, firms, and corporations save and except the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to the extent hereinbefore adjudged, and that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to appropriate the waters of said river in excess of 1.543 cubic feet per second for the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner, and 5 cubic feet per second for the City of Muskogee, and, the Court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all the waters of the Grand River and its tributaries in Oklahoma, except 1.543 cubic feet per second in favor of the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and that it is unnecessary for the Grand River Dam Authority to apply to the Oklahoma Planning and Resources Board

for a permit to appropriate the waters of Grand River to a beneficial use or secure from the Oklahoma Planning and Resources Board a permit or license to appropriate said waters to a beneficial use, or to construct works or facilities for use in applying said waters to a beneficial use; that no person, firm or corporation other than those hereinbefore mentioned, has ever applied for the right to appropriate or actually appropriated the waters of said River to a beneficial use.

15. The Court further finds and adjudges that the Grand River Dam Authority has declared its intention to construct and is now engaged in constructing a dam approximately 147 feet in height, across the Grand River near the Town of Pensacola, in Mayes County, Oklahoma; that said dam will impound at the power pool level 1,600,000 acre feet of water, and at the flood pool level 2,200,000 acre feet of water; that the Grand River Dam Authority has declared its intention and is proceeding to construct in connection with the said dam, a hydro-electric power plant with an installed capacity of 60,000 K.W., through which will pass during the operation of the plant, water varying from 1,000 to 6,000 cubic feet per second; said dam to be equipped with flood gates to control the flood waters of said river and with a sluice gate 10 feet square in the lower part of the dam structure, through which the waters of the river may be discharged at any time.

16. The court further finds and adjudges that at the Pensacola dam site the average flow of the Grand River is 6300 cubic feet per second, and that at the mouth of said river the average flow of the stream is 8400 cubic feet per second; that the run-off of the water shed of the Grand River below the Pensacola dam site is more than sufficient to supply the needs of the City of Pryor Creek, the City of Wagoner, the City of Muskogee and the Town of Fort Gibson, which take their water supply from the Grand River below the Pensacola dam site, and that the construction and operation of the Grand River dam and hydro-electric power plant by the Grand River Dam Authority will maintain in the channel of the Grand River below the Pensacola dam site, a very much larger flow during dry periods than now exists; that the control of the flood waters of Grand River through operation of the flood gates of said dam, will protect the waterworks facilities of said cities from inundation during flood periods; that the construction and operation of said dam by the Grand River Dam Authority will substantially aid in preventing the waters of the Arkansas River from entering the intake of the Muskogee waterworks system; that the construction and operation of said dam and hydro-electric power plant will materially benefit

the municipalities using the waters of Grand River for municipal purposes, by maintaining in said river a regular flow of water and providing them a better quality of water for their consumption; that the City of Vinita takes its supply of water for municipal purposes from the Grand River above the Pensacola Dam Site.

17. the Court further finds and adjudges that neither the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Grand-Hydro, nor Clontz & Bozarth, have any rights to any of the waters of Grand River or its tributaries, and have never appropriated or applied any of the waters of said stream or its tributaries to a beneficial use.

18. The Court further finds and adjudges that subject to the prior right of the Town of Fort Gibson to divert and appropriate for municipal purposes 1.543 cubic feet per second of the flow of Grand River, and of the City of Wagoner to divert and appropriate for municipal purposes 2 cubic feet per second of the flow of Grand River, and of the City of Muskogee to divert and appropriate for municipal purposes 5 cubic feet per second of the flow of Grand River, and the prior right of the Grand River Dam Authority to appropriate all of the remaining flow of the Grand River for the purposes set forth in the Act creating the Grand River Dam Authority, the priorities of the parties hereto in the matter of making application to the proper authorities for a permit to appropriate the waters of Grand River to a beneficial use since statehood, are as follows and for the following purposes and to the following extent:

(1) The City of Pryor Creek to the extent of .375 cubic feet per second for its present municipal needs, and .75 cubic second feet for its future needs.

(2) The City of Muskogee to the extent of 30 cubic feet per second feet for municipal purposes;

(3) The City of Vinita to the extent of 5 cubic feet per second for municipal purposes;

(4) The City of Wagoner to the extent of 4 cubic feet per second for municipal purposes;

(5) T. C. Bowling, the waters of Mayes Branch, a tributary of Grand River, to the extent of 550 acre feet for fish culture and irrigation;

(6) Cedar Crest Lakes, 500 acre feet of the flow of Spring Creek, a tributary of Grand River in Mayes County, Oklahoma, for recreation and fish culture.

19. It is further ordered and adjudged by the Court that the total costs of this action are hereby taxed at $150.00, of which said sum the plaintiff of the City of Tulsa will pay $75.00, and the Grand River Dam

Authority $50.00, the City of Muskogee $15.00, and the Town of Fort Gibson and City of Wagoner each $5.00.

20. The defendants Oklahoma Hydro-Electric Company, City of Muskogee, City of Wagoner, City of Pryor Creek, City of Vinita, City of Miami, Town of Fort Gibson, Cedar Crest Lakes Company and T. C. Bowling, each excepts to the Court's findings and decree, which exceptions are hereby allowed by the Court.

RENDERED IN OPEN COURT this 14th day of February, 1938.

N. B. JOHNSON, JUDGE

(ENDORSED): No. 5263. In the District Court of Mayes County, Oklahoma. City of Tulsa, a municipal corporation, Plaintiff, vs. Grand-Hydro, a corporation, et al., Defendants. Decree. Filed in the District Court Mayes County, Oklahoma, February 10, 1938, R. A. DeLozier Court Clerk, by _____ Deputy. Recorded in Civil Journal No. 16, at page D. 82-83-84-85-86-87-88-89."

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INVESTMENT IN WATERWORKS PROPERTY

CITY OF TULSA, OKLAHOMA

WATERWORKS BONDS

WATERWORKS OF 1911	$ 90,000.00
WATERWORKS OF 1916	50,000.00
WATER FILTRATION OF 1916	180,000.00
WATER PUMP STATION of 1917	15,000.00
WATER PUMP & MAINS of 1917	660,000.00
WATERWORKS OF 1921	200,000.00
PRELIMINARY WATER SURVEY of 1921	25,000.00
WATERWORKS OF 1922	$6,800,000.00
WATERWORKS OF 1924	700,000.00
WATERWORKS OF 1925	500,000.00
RED FORK WATERWORKS OF 1917	20,000.00
RED FORK WATERWORKS OF 1921	19,000.00
RED FORK WATERWORKS OF 1925	50,000.00
CARBONDALE WATERWORKS OF 1926	35,000.00
WATERWORKS OF 1935	25,000.00
TOTAL WATERWORKS BONDS	$9,369,000.00

INVESTMENT IN WATERWORKS PROPERTY
CITY OF TULSA, OKLAHOMA

CAPITAL INVESTMENT FOR WATERWORKS IMPROVEMENT WITH FUNDS DERIVED FROM WATER DEPARTMENT REVENUE BY YEARS

1921	$ 106,109.00
1922	112,628.00
1923	197,965.00
1924	178,095.00
1926	330,586.00
1927	505,130.00
1928	489,378.00
1929	389,511.00
1930	299,534.00
1931	603,404.00
1932	303,074.00
1933	45,705.00
1934	17,157.63
1935	3,002.80
1936	10,365.65
1937	28,779.94
	43,847.98
TOTAL IMPROVEMENTS FROM REVENUE	$3,694,297.00

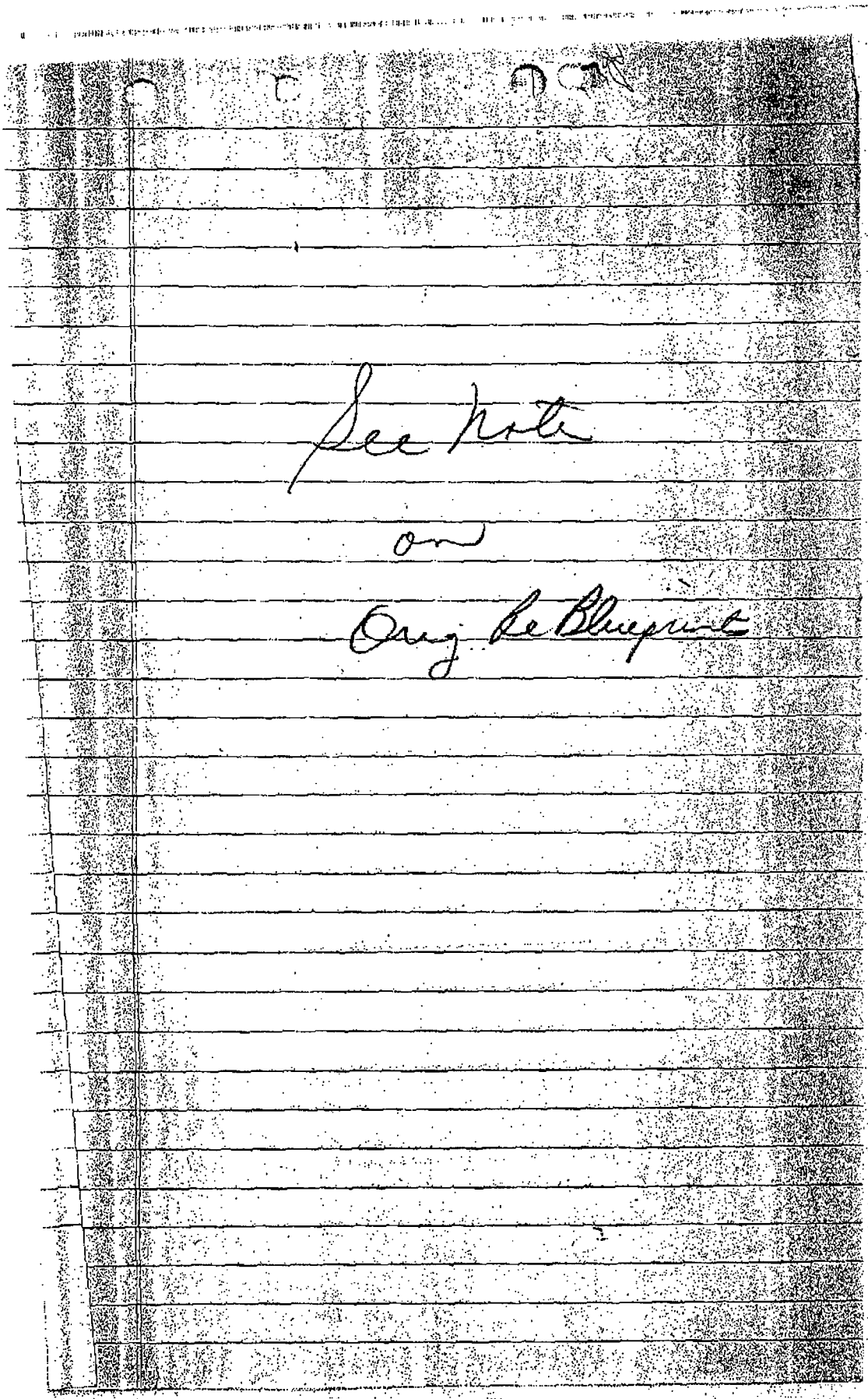
SUMMARY

Capital Improvements from Bonds	$9,369,000.00
Capital Improvements from Water Department Revenue	3,694,297.20
TOTAL	$13,063,297.20

WATER DELIVERED INTO SPAVINAW CONDUIT

OCTOBER 24, 1924 to JULY 1, 1938 by YRS.

YEAR	MILLION GALLONS
1924	1,775
1925	9,125
1926	9,125
1927	9,125
1928	9,125
1929	9,125
1930	9,125
1931	9,125
1932	9,125
1933	9,125
1934	9,125
1935	9,125
1936	9,125
1937	9,125
1938	4,563
TOTAL	124,963


See Note
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Certified Copy

STATE OF OKLAHOMA)
) SS
COUNTY OF MAYES)

CERTIFICATE OF TRUE COPY

I, R. A. DeLOZIER, the duly qualified, elected and acting Court Clerk in and for said County and State, do hereby certify that the annexed and foregoing instrument is a full, true and correct copy of the original Judgment rendered on the 14th day of February, 1938, in the action styled; City of Tulsa, plaintiff, vs. Grand-Hydro, et al., Defendants, No. 5263 in the District Court of said County, (and from said judgment no appeal was perfected) as the same appears of record and on file in my said office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Pryor, Oklahoma, this 1st day of November, 1938.

R. A. DeLOZIER
Court Clerk

By Lucille Utley
Deputy

(SEAL)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

1. THE CITY OF TULSA, and 2. THE TULSA METROPOLITAN UTILITY AUTHORITY	PLAINTIFFS
v.	CASE NO.: 01 CV 0900EA(C)
1. TYSON FOODS, INC., 2. COBB-VANTRESS, INC., 3. PETERSON FARMS, INC., 4. SIMMONS FOODS, INC., 5. CARGILL, INC., 6. GEORGE'S, INC., and 7. CITY OF DECATUR, ARKANSAS	DEFENDANTS

POULTRY DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO POULTRY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

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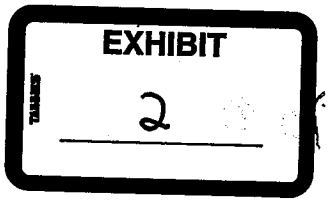
10-42472.01



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INTRODUCTION

This case is before the Court on the Poultry Defendants' (Nos. 1 through 6 above) Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (hereinafter referred to as the "Motion"). Plaintiffs have filed their Response to the Motion (hereinafter referred to as the "Response"). The Poultry Defendants offer the following in reply to the arguments raised by Plaintiffs in their Response.

PROPOSITION I

OKLAHOMA STATE LAW IS PREEMPTED BY THE PACKERS AND STOCKYARDS ACT AND AGRICULTURE FAIR PRACTICES ACT PURSUANT TO WHICH THE RELATIONSHIP BETWEEN THE POULTRY DEFENDANTS AND THE CONTRACT GROWERS HAS BEEN LEGISLATIVELY DEFINED AS THAT OF INDEPENDENT CONTRACTOR RATHER THAN AN EMPLOYER AND EMPLOYEE RELATIONSHIP.

In Section A(1) of the Motion, the Poultry Defendants discussed the Packers and Stockyards Act ("PSA") and the Agriculture Fair Practices Act ("AFPA") and set forth authority for the proposition that Oklahoma state law on the issue of the characterization of the relationship between the Poultry Defendants and the Contract Growers was preempted. As was clearly stated in the Motion, the Poultry Defendants' arguments regarding preemption were based upon the theory of implied preemption as that theory has been articulated and applied over many years, by many courts, including the United States Supreme Court. Although the Plaintiffs appear to agree with the statement of legal authority offered by the Poultry Defendants in their Motion, Plaintiffs argue against preemption in this case. None of the factual or legal arguments offered by Plaintiffs in their Response have any bearing upon the application of implied preemption in this case.

As pointed out in the Motion, implied preemption occurs where "the scope of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the

state to act." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). As succinctly stated by Plaintiffs, implied preemption exists in situations where Congress has not preempted the entire field, but has preempted the field to the extent that state law actually conflicts with federal law. (*See* Plaintiffs' Response, pg. 7 (citing *Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984)).

After citing the correct standards to be applied, Plaintiffs cease following the correct *implied* preemption analysis and merely attempt to confuse the issue by discussing various cases and other authorities dealing with *express* preemption, which has not been argued by the Poultry Defendants in this case. Even after alleging that they focus their Response on implied preemption, Plaintiffs devote a significant portion of the "analysis" in their Response to arguing that the field has not been expressly preempted. Though plaintiffs' review of that authority is intriguing, it is wholly irrelevant to the case at bar. The Poultry Defendants have never argued express preemption.

Furthermore, none of the implied preemption cases cited by Plaintiffs pertain in any way to the particular aspects of the PSA and AFPA which are relied upon by the Poultry Defendants in support of their implied preemption arguments. The issue before the Court pursuant to the Poultry Defendants' Motion is whether or not the enactment of the PSA and AFPA wherein Congress clearly defines Contract Growers as independent contractors rather than employees precludes this Court from seeking to apply state law principles to reach a contrary conclusion. In an attempt to cloud the otherwise simple issue before the Court, Plaintiffs reference this Court to cases holding that the PSA and AFPA do not preempt application of state law in the context of: (i) liability of a marketing agency for selling cattle for someone who does not own the cattle, (ii) ability of turkey growers to pursue state law negligence claims, and (iii) state inspection laws.

(*See* Plaintiffs' Response, pgs. 9-11). Obviously, none of those cases have any bearing upon the issue of whether or not the enactment of the PSA and AFPA by Congress precludes this Court from applying state law in such a way as to characterize the relationship between the Contract Growers and Integrators as something other than that specified in the PSA and AFPA. It appears that no court has yet to pass upon that precise issue, at least not in any reported decision. As such, this Court must look to the general principles of implied preemption in making its decision in this case.

As Plaintiffs acknowledge in their Response, Congressional intent is the pivotal inquiry in any implied preemption analysis. Despite this acknowledgment, Plaintiffs fail to cite to any actual authority that supports their assertion that implied preemption does not exist in this matter. The only evidence of actual Congressional intent was provided by the Poultry Defendants in the Motion and was completely undisputed by Plaintiffs in their Response. The only documented Congressional intent in the record shows that in revising the PSA and AFPA to include contract growers and to expressly state that contract growers are not employees of integrators, Congress intended to bring agriculture in line with modern business practices. (*See* Poultry Defendants Motion, pg. 17). As such, when looking to Congressional intent, it is clear that Congress added its provisions providing that Contract Growers are not employees and providing for contracts to be the basis for the relationship between the Contract Grower and the integrator *to support vertical integration farming, to support the independent contract grower, and to modernize agriculture.* If that were not the intent, Congress would not have needed to bring Contract Growers within the coverage of the PSA and AFPA in the first place.

Plaintiffs also acknowledge that preemption may be implied where *simultaneous compliance* with state and federal law is impossible or the state law *stands as an obstacle* to a

Congressional objective. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 204 (1985). Both of these situations would result if this Court decides that Contract Growers in the watershed are agents or employees of the Poultry Defendants. Because the PSA and AFPA provide that an independent contract grower who chooses to contract with an integrator is expressly defined as not being an employee or agent of the integrator, a decision to the contrary would not only be an obstacle to the PSA but would interfere with its purposes of protecting independent contract growers. The Plaintiffs' assertions to the contrary in their Response are clearly misplaced and should not be afforded any weight. As such, implied preemption clearly exists.

Plaintiffs seek to further confuse the issue in their Response by arguing that the Poultry Defendants' position is misplaced because the Poultry Defendants themselves have employees who run *company farms,* which is true. However, the PSA and AFPA were not designed to protect company farms (i.e., protect the integrator from itself), but instead were designed to protect and assist independent contract growers. The two situations are entirely unrelated and any reference to company owned farms is completely irrelevant.

PROPOSITION II

THE RELATIONSHIP BETWEEN THE POULTRY DEFENDANTS AND THE CONTRACT GROWERS IS THAT OF BAILOR/BAILEE AND AS SUCH THE POULTRY DEFENDANTS ARE NOT LIABLE FOR DAMAGES AND/OR CAUSES OF ACTION ARISING FROM ALLEGED ACTS OR OMISSIONS OF THE CONTRACT GROWERS.

Plaintiffs' arguments in response to the Poultry Defendants' argument regarding bailment is as unpersuasive as their response to the fact that implied preemption governs the relationship between contract growers and integrators. In this portion of their Response, Plaintiffs refer the Court to their Motion for Summary Judgment on Integrators' Liability for their Growers'

Disposal of Poultry Manure for the proposition that bailment does not apply to this situation. Accordingly, the Poultry Defendants hereby adopt and incorporate herein by reference their Joint Response to Plaintiffs' Motion for Summary Judgment on Integrators' Liability for their Growers' Disposal of Poultry Manure as that Response easily dispels Plaintiffs' proposition and illustrates that the arguments set forth in Plaintiffs' motion on that issue are without merit.

It is without question that the conduct upon which Plaintiffs' claims are premised occur entirely within the confines of a bailment relationship between the Poultry Defendants and the Contract Growers. The Poultry Defendants deliver poultry to Contract Growers for the particular purpose of raising the poultry under contract. Ownership of the birds remains with the Poultry Defendants at all times. These undisputed facts squarely meet all of the elements of the "bailment" definition provided in *Broaddus v. Commercial Nat. Bank of Muskogee*, 237 P.2d 583 (1925). Pursuant to the contract between them, the bailee/contract grower agrees that the bailor/integrator can direct certain aspects of its operation that directly impact the quality and suitability of the end product of the contractual agreement, i.e., the birds. Because of that bargained-for consideration, Plaintiffs contend that a bailor/bailee relationship does not exist. There is no indication in any of the cases or applicable statutes that the bailor and bailee cannot contractually agree that the bailor can make suggestions and impose certain quality assurance requirements regarding the finished product of the bailment.

Plaintiffs' arguments regarding the "control" allegedly exerted by the Poultry Defendants over various conditions relating to the raising of the birds, and the suggestion that such retained rights of "control" defeat the existence of a bailment are misplaced. Somehow, the Plaintiffs overlook the fact that it is the litter produced not the growing of poultry that they complain of. Plaintiffs have adduced absolutely no evidence suggesting that the Poultry Defendants have

exerted any degree of control over the Contract Growers' practices of land applying litter. In fact, the absence of any such control by the Poultry Defendants over those practices is the very heart of Plaintiffs' claims against the Poultry Defendants in this case.

Plaintiffs have offered absolutely no arguments or evidence sufficient to take the relationship of the Poultry Defendants and Contract Growers outside of the bailor/bailee relationship, at least not in the context of the Contract Growers' practices of land applying litter. The instant case is indistinguishable from the case of *Oklahoma Publishing Company v. Autry*, 463 P.2d 334 (Okla. 1969) discussed at length by both parties in their opening briefs where the court refused to impose liability upon a bailor for the acts of its bailee. The Poultry Defendants do not actually place litter where plaintiffs complain of. The Poultry Defendants do not select or recommend to the Contract Growers the location where litter is to be placed, nor do they exercise any control over where the litter is placed because contractually they do not have the right to do so. The Plaintiffs' assertions about "control" regarding the finished product are completely irrelevant to the issue of control over litter and do not defeat the persuasive and compelling authorities set forth in the Poultry Defendants' Motion on this issue. Therefore, to the degree that Plaintiffs' claims are based upon the acts or omissions of the Contract Growers, those claims fail as a matter of law and should be dismissed by the Court.

PROPOSITION III

THE PLAINTIFFS CANNOT RECOVER FROM THE POULTRY DEFENDANTS DUE TO THEIR INABILITY TO ESTABLISH A CAUSAL LINK BETWEEN THE DAMAGES OR INJURIES ALLEGED AND THE ACTS OR OMISSIONS OF ANY PARTICULAR POULTRY DEFENDANT OR ANY PARTY(IES) FOR WHOSE CONDUCT ANY PARTICULAR POULTRY DEFENDANT COULD BE HELD LIABLE.

Plaintiffs cannot submit any proof on the issue of causation, so instead they intertwine the issues of causation and the applicability of joint and several liability. Plaintiffs mistakenly argue that because they are asserting *intentional* torts they do not have to prove causation by each defendant because the Poultry Defendants are jointly and severally liable. (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pgs. 2-5). However, proof of causation is a required element of every cause of action, regardless of the nature of the claim, whether founded on negligence, reckless conduct, intentional conduct, or even breach of contract or warranty. Accordingly, whether Plaintiffs allege that the Poultry Defendants acted negligently or intentionally has no bearing on the issue of *causation*. In other words, even assuming *arguendo* that Plaintiffs' unfounded accusations that the Poultry Defendants intentionally dumped tons of poultry litter in the Watershed were true, it is immaterial to this lawsuit unless Plaintiffs can present legally sufficient evidence that the litter from Contract Growers for each defendant found its way to Lake Eucha or Spavinaw and caused damage. While it is true that in certain situations joint and several liability is imposed on defendants if they acted intentionally, the issue of whether liability is several or joint and several is the second step in the analysis - first and foremost, Plaintiffs must prove that their damages were caused by the Poultry Defendants. Plaintiffs simply cannot meet that burden. Plaintiffs cite *Union Texas Petroleum Corp. v. Jackson*, 909 P.2d 131 (10th Cir. 1995) in support of their creative argument that to merely *allege intentional conduct* is sufficient to prove causation by the Poultry Defendants. However, Plaintiffs mis-characterize the facts and law of that case. *Union Texas* involved an appeal from the Oklahoma Corporation Commission's rulings regarding liability of oil companies for saltwater contamination to the subsurface waters of the town of Cyril. *Id.* at 135. All oil

companies who had operated in the area were parties to the action. *Id.* Contrary to what Plaintiffs would lead the Court to believe, the ALJ specifically ruled that no "liability or responsibility would be imposed" without proof of "*causation* and injury." *Id* at 136 (*emphasis added*). There is no mention anywhere in the opinion of the far-fetched concept that a plaintiff is relieved of the burden of proving causation if he alleges the defendant acted intentionally. In fact, whether the respondent oil companies acted intentionally or negligently was not even an issue in the case. To enable him to decide the issues of causation and damages, the ALJ conducted a 21-day evidentiary hearing. As a result, the ALJ found that certain subsurface waters were contaminated with saltwater. *Id.* at 135. Significantly, the ALJ further found that "oil and gas production operations are the *only* source of saltwater in the area." *Id.* (*emphasis added.*) And, unlike the present case, *all* of the potential contributors of the pollutant (saltwater) were parties to the action.

The facts of the instant case are easily distinguished from the facts of *Union Texas*. Poultry litter is only one of many sources of phosphates in the Watershed, yet Plaintiffs attempt to place all the blame for their alleged injuries on poultry litter. Furthermore, in *Union Texas* the oil production activities occurred in the immediate vicinity of Cyril. In this case, Plaintiffs assert that all phosphates from poultry litter land-applied in the relevant portion of Arkansas has made its way to Lake Eucha or Spavinaw and caused injury. However, as stated more fully in the Poultry Defendants' Motion, Plaintiffs' primary expert Dr. Storm did not take into account topography or any other natural phenomena which affect whether phosphates in Arkansas soil would ever get as far as Lake Eucha - he merely assumed that it did.

Another tactic Plaintiffs employed in attempting to conceal their inability to meet their burden of proof of causation is to refer to injury to the "Watershed." For example, Plaintiffs

state that they do not have to prove causation with respect to each Defendant "because injury to the Watershed is indivisible." (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pg. 2.) Moreover, the Plaintiffs cite an excerpt of Dr. Shannon's deposition in which he states that some phosphates in the Watershed are attributable to land-applied poultry litter. (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pg. 8.) However, Plaintiffs do not own the "Watershed" - instead, they own, at the very most, a license to use a limited quantity of the waters contained in Lakes Eucha and Spavinaw.[1] The "Watershed" consists of thousands of acres of real property in Arkansas and Oklahoma which is owned by various and sundry persons, the vast majority of whom are not parties to this lawsuit. Accordingly, the only legal claim that Plaintiffs have is for damage, if any, to the waters in Lakes Eucha and Spavinaw, assuming that Plaintiffs' license is sufficient to support a cause of action for trespass or nuisance.[2] As such, Plaintiffs have the burden of proving that the waters in Lakes Eucha and Spavinaw have been damaged by the conduct of each of the Poultry Defendants. Plaintiffs simply cannot meet their burden of proof on this issue. Plaintiffs principally rely on the modeling work done by Dr. Storm in support of their claims. As stated in the Poultry Defendants' Motion, Dr. Storm cannot opine as to the amount of phosphates in the lakes, if any,

[1] See Defendant City of Decatur's Motion for Summary Judgment and Brief in Support, p. 4, and Exhibit 1 thereto.

[2] Whether the license to utilize a limited amount of the waters of Lakes Eucha and Spavinaw is legally sufficient ownership of property to support a trespass or nuisance claim is addressed in Defendant Cargill's Separate Motion for Summary Judgment, as well as Decatur's Motion for Summary Judgment, both of which are hereby adopted by the Poultry Defendants and incorporated herein by reference.

are attributable to any of the Defendants - he did not even attempt to calculate it.[3] In fact, neither Dr. Storm nor any other expert in this case has opined that the conduct of any particular defendant (much less the conduct of each and every defendant) has resulted in the contribution of phosphates to Lakes Eucha and Spavinaw. At best, Plaintiffs have offered proof that each defendant has Contract Growers in the Watershed which produce litter that may or may not have been land applied in the Watershed. Plaintiffs have offered nothing in the way of actual proof of causation with respect to any (let alone each) Poultry Defendant. When confronted with this shortcoming, Plaintiffs state that Dr. Storm is not the only expert they rely on to support their claims. (*See*, Plaintiffs' Combined Response to Motions for Summary Judgment by Tyson Foods, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc. on the Issue of Causation, pgs. 8-9.) However, none of the other experts Plaintiffs have named can offer any evidence as to the causal link between the phosphates in the Lakes and the conduct of any of the Poultry Defendants. Plaintiffs simply cannot meet their burden of proof on the issue of causation and Defendants are entitled to summary judgment on all of Plaintiffs' claims.

PROPOSITION IV

THE POULTRY DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR DISMISSING PLAINTIFFS' CERCLA CLAIM AS A MATTER OF LAW.

Plaintiffs devote over sixteen (16) pages of their Response in trying to revive a claim for relief under CERCLA which clearly cannot survive summary judgment. The inescapable reality which Plaintiffs have asked this Court to ignore is that CERCLA does not apply in this case because there has been no release of a hazardous substance and the land application of poultry litter falls squarely within the fertilizer exception contained in CERCLA. Moreover, if

[3] See Poultry Defendants' Motion, pg. 24, and Exhibit N.

CERCLA applies, Plaintiffs' claim still must fail given their failure to comply with the NCP.

A. Plaintiffs cannot identify a release of a hazardous substance as is essential to any *prima facie* claim for relief under CERCLA.

All parties agree that the only substances contained in poultry litter which could even arguably trigger the application of CERCLA are phosphates (specifically orthophosphate, PO_4). (*See,* Plaintiffs' Response, pg. 17.) It is also undisputed that the molecular composition of orthophosphate (like all other phosphates and countless products used and discarded every day, including over 12,000 food products) includes phosphorus. Plaintiffs ask this Court to render an unprecedented ruling that when the EPA listed *elemental phosphorus* as a hazardous substance under CERCLA, it intended to declare "all phosphorus containing compounds" as hazardous substances as well. There simply is no support (legally or logically) for Plaintiffs' position.

This issue has been extensively briefed by the Poultry Defendants at section V(A)(1) of their Motion and at section III(A) of the Poultry Defendants' Response to Plaintiffs' Motion for Summary Judgment on CERCLA Liability. In the interests of brevity and judicial economy, the Poultry Defendants incorporate those arguments and authorities herein by reference. The Poultry Defendants have clearly demonstrated that phosphates contained in poultry litter are not a "hazardous substance" under CERCLA and therefore the Poultry Defendants are entitled to summary judgment with respect to Plaintiffs' CERCLA claim.

The only "new" issue raised by Plaintiffs in their Response which has not already been addressed and squarely refuted by the Poultry Defendants in their previous filings in this case pertains to Plaintiffs' citation of several cases wherein they contend courts have held that phosphates are "toxic". (*See,* Plaintiffs' Response, pg. 17, fns. 9-10 (citing *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F.Supp. 567, 571 (E.D. S.C. 1965) and *Soap & Detergent Assoc. v. Clark*, 330 F. Supp. 1218, 1220 (S.D. Fla. 1971)). Neither of Plaintiffs' "new" cases have any

applicability to the matters before this Court. *Gonzalez* is a products liability case in which a crop dusting pilot sued a manufacturer of defoliant used in crop dusting because the manufacturer failed to obey labeling requirements of South Carolina law or the Federal Insecticide, Fungicide and Rodenticide Act. The matter was brought fifteen years prior to the enactment of CERCLA and as such there is no discussion regarding phosphates being a defined hazardous substance under CERCLA. In short, *Gonzalez* has absolutely no applicability with respect to Plaintiffs' CERLCA claim. *Soap & Detergent Assoc.* is a case regarding the constitutionality of a county ordinance prohibiting the sale or use of detergents containing phosphorus in highly populated Dade County, Florida. Nowhere in the decision does the court label or even discuss whether or not phosphorus is "toxic." In any event *Soap & Detergent Assoc.* was brought prior to enactment of CERCLA and does not provide any support to or insight with respect to Plaintiffs' creative argument that phosphate, as it is found Poultry Litter, is a defined hazardous substance under CERCLA.

B. Plaintiffs Response Actions are "Removal" not "Remedial" as a matter of law, and therefore only "substantial compliance" with the NCP is required.

In an apparent attempt to avoid the indisputable evidence of a complete lack of compliance by Plaintiffs' with the NCP as is required to recover under CERCLA, Plaintiffs have declared (and on the basis of that declaration alone ask this Court to accept) that their response actions for which they are seeking response costs were "removal" rather than "remedial." Plaintiffs' motives are quite transparent. Upon examination of the case law and legal authority expounding upon NCP compliance as a pre-requisite for recovery under CERCLA, Plaintiffs have discovered that while the law is fairly unforgiving on the issue of NCP compliance in the context of remedial actions, the standard of compliance is relaxed somewhat for removal actions.

Sherwin Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 475 (E.D. Mich. 1993). The Poultry Defendants do not dispute Plaintiffs' statement that "only substantial compliance with the NCP is required in removal actions." Plaintiffs do, however, dispute Plaintiffs' unsupported suggestion that the actions undertaken by Plaintiffs for which they are seeking to recover response costs in this case are more appropriately characterized as "removal" rather than remedial in nature.

CERCLA defines removal actions as "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release . . . ." 42 U.S.C. 9601(23). "Removal actions are short term responses to imminent threats to the public safety or the environment. They are to be taken 'in response to an immediate threat to the public welfare or to the environment.'" *Sherwin Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 475 (E.D. Mich. 1993). *citing Amland Properties Corp. v. Alcoa*, 711 F. Supp. 784, 795 (D.N.J. 1989); *see also Channel Master Satellite Sys., Inc. v. JFD Electronics. Corp.*, 748 F. Supp. 373, 384-86 (E.D.N.C. 1990). "CERCLA distinguishes the two types because 'removal actions were designed to provide an opportunity for immediate action ... without detailed review due to the exigencies of the situation.'" *Sherwin Williams*, 840 F. Supp. at 475 *citing Channel Master*, 748 F. Supp. at 385-56.

Remedial actions are defined as "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term

includes . . . neutralization, cleanup of released hazardous substances and associated contaminated materials." 42 U.S.C. 9601(24).

Plaintiffs' response actions taken with respect to the Water Supply if anything could only be remedial in nature. Plaintiffs' assertion that their response actions are "removal" is simply absurd. As stated above, CERCLA distinguishes the two types because 'removal actions were designed to provide an opportunity for immediate action . . . without detailed review due to the exigencies of the situation.'" *Sherwin Williams*, 840 F. Supp. 470, 475 *citing Channel Master*, 748 F. Supp. at 385-56. Plaintiffs have participated in seven extensive studies and analysis over the last six years all of which they claim to be response costs in this action. (*See* Exhibit 35 to Plaintiffs' Motion for Summary Judgment) This could hardly be described as "immediate action," furthermore the Plaintiffs' costs associated with studies and review performed in the last six years are in excess of $795,000.00, a clear indication of detailed review.

In *Sherwin Williams,* the City of Hamtramck argued that its response action amounted to removal activity. The court found the city's response had taken at least five years and the city demonstrated no imminent threat to health or safety and the extended and protracted nature of the response indicted that the city engaged in a remedial action. *Id. at 475-76.* Plaintiffs in this case, just as the City of Hamtramck, have engaged in an extended and protracted response in which there is no imminent threat to health or safety. As such, their action is remedial in nature.

Notwithstanding Plaintiffs' attempt at revisionist history, there can be no legitimate dispute that the actions at issue in this case are more appropriately characterized as "remedial" rather than "removal" in nature. As such, substantial compliance with the NCP is required. Plaintiffs have not and cannot demonstrate substantial compliance and, therefore, their CERCLA claim must fail as a matter of law. Furthermore, as was demonstrated in Section V(A)(2) of the

Motion and as is discussed further herein below, the Plaintiffs can not demonstrate *any level of compliance* with the NCP, substantial or otherwise. Therefore, summary judgment in favor of the Poultry Defendants is appropriate regardless of whether the Plaintiffs' actions were "removal actions" or "remedial actions."

C. Plaintiffs cannot demonstrate compliance (substantial or otherwise) with the NCP, and such a finding as matter of law is appropriate prior to trial.

No where is Plaintiffs' lack of faith in their arguments regarding NCP compliance more evident than in their request that this Court arbitrarily divide its decision-making process with respect to the merits of their CERCLA claim into two separate stages or phases. While Plaintiffs acknowledge that this Court can and should rule at the summary judgment stage on the issues of whether phosphates are hazardous substances under CERCLA and the applicability of the fertilizer exception, they ask this Court to delay until trial any rulings on NCP compliance and damages. Every court to have considered the issue has held that NCP compliance is an essential element of a *prima facie* claim for relief under CERCLA. *See, e.g. Public Service Co. of Colorado v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999); *Morrison Ent. V. M. Shares, Inc.*, 302 F.3d. 1127 (10th Cir. 2002.) As such, Plaintiffs have the burden of proving such compliance and in the absence of such proof they cannot recover damages under CERCLA.

Notwithstanding the foregoing statement of the law, which Plaintiffs have not disputed, Plaintiffs have requested that this Court "delay" its ruling on the issue of NCP compliance (or in this case "non-compliance") raised by Poultry Defendants in their Motion. In support of their request for a "delayed ruling" on the issue of NCP compliance, Plaintiffs argue that it is appropriate for this Court to "bifurcate" the proceedings on their CERCLA claim. This Court is not required to bifurcate Plaintiffs claims into separate trials. In *Acushnet Company v. Mohasco*

Corp. 191 F.3d 69, 81 (1st Cir. 1999) the court held that "district courts have considerable latitude to deal with issues of liability and apportionment in the order they see fit to bring the proceedings to a just and speedy conclusion. CERCLA does not demand a bifurcated trial on this score ..." This Court has the authority to decide Plaintiffs CERCLA claim in its entirety (i.e. liability, NCP compliance, necessary costs of response and apportionment) on summary judgment, in a single trial or a bifurcated trial in order to bring this matter to a just and speedy conclusion.

Finally, Plaintiffs argue that a determination of compliance with the NCP is "too fact intensive" to be made pursuant to summary judgment. Of course, Plaintiffs offer absolutely no evidence to support that characterization nor do they even attempt to identify the "facts" which will require so much of the Court's time in considering their claim of compliance with the NCP. Furthermore, the notion that establishing compliance with the NCP involves a fact-intensive inquiry by this Court is absurd. As explained by the Poultry Defendants in their Motion, the NCP has very specific and detailed provisions applicable to response actions under CERCLA. Although it appears that Plaintiffs were not aware of those provisions at the time in which they were involved in their "response actions," they are obviously aware of them now. If the Plaintiffs have complied with those provisions, such compliance could easily be demonstrated by simply providing documentary proof or evidence in the form of a affidavits setting forth the specific actions or conduct which they undertook in compliance with the NCP. Plaintiffs are merely seeking to delay the inevitable – a finding of noncompliance with the NCP.

1. Public Comment

Plaintiffs eleventh hour attempt to show public comment is woefully inadequate. Plaintiffs seem to be arguing that because they are "public bodies" their activities performed in

"open meetings" would be sufficient to satisfy the public comment requirement under the NCP. In support, Plaintiffs attach less than five notices and agenda's of TMUA meetings. (See Exhibits G and H to Plaintiffs' Response). Interestingly, those documents were produced to the Poultry Defendants less than three weeks ago, subsequent to the Poultry Defendants filing its motion for summary judgment.[4] Regardless of the lateness of the production, Plaintiffs' actions in its response do not reflect substantial compliance with the public comment requirement of the NCP. Plaintiffs have not produced a single document which reflects Plaintiffs seeking the public's comment or the public commenting on Plaintiffs' activities. Moreover, Plaintiffs have not produced a single document which shows that Plaintiffs published a brief analysis of the proposed plan in a major newspaper; that Plaintiffs allowed not less than thirty days for the submission of written or oral comments from the public; or that Plaintiffs conducted a public meeting during the comment period at or near the proposed cleanup site. *Sherwin Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 477 (E.D. Mich. 1993) *citing* 40 C.F.R. § 300.430(f)(3)(A)-(E). "Courts have consistently held that failure by a party to provide for the required opportunity for public comment 'renders a remedial action inconsistent with the NCP and bars recovery of costs'" *Id.* at 476 (internal citations omitted). Clearly, Plaintiffs have failed to show any compliance with the public comment requirement of the NCP and as such their CERCLA claim must fail.

2. Remedial Site Evaluation, Feasibility Study, and Selection of Remedy

Plaintiffs' attempt to show compliance with the NCP's requirements with respect to site evaluation, feasibility study and remedy selection is also inadequate. Plaintiffs attach excerpts of

[4] Even more troubling is the fact that those documents were neither identified nor disclosed by Plaintiffs in response to discovery requests specifically asking for documents that Plaintiffs contend are evidence or support their claimed compliance with the NCP.

reports which they partially funded and participated in at exhibits K, L, M to their Response. None of these reports substantially comply with requirements of the NCP with respect to site evaluation, feasibility study and remedy selection. The Poultry Defendants have extensively briefed and identified the flaws of Plaintiffs' reports in Sections V(A)(2)(a)(b) and (c) of the Motion and hereby incorporate those sections by reference as if fully set forth herein.

3. Appropriateness of Expert Testimony to Show NCP Compliance.

Plaintiffs argue that expert testimony is appropriate to show compliance with the NCP, but admit that "the characterization of a response action is a matter for the court and should not be abdicated to an expert." (Plaintiffs' Response, p. 28.) Plaintiffs are unable to cite a single case which expressly states that expert opinions with respect to NCP compliance is permitted. Additionally, subsequent to his deposition, Plaintiffs have procured an affidavit from their expert, Ben Costello identifying litigation experience which Mr. Costello claims qualifies him as an expert on NCP compliance. These cases were not included in Mr. Costello's curriculum vitae previously provided to the Poultry Defendants and the Court. Mr. Costello's subsequent additions are prejudicial to the Poultry Defendants in that they were not given the opportunity to depose him with respect to all of his alleged experience. Moreover, the Poultry Defendants have extensively discussed this issue in the Poultry Defendants' Motion in Limine to exclude the testimony of Ben Costello and hereby incorporate same by reference as if fully set forth herein.

D. The Contract Growers' Land Application of Poultry Manure Does Qualify for the "normal" application of fertilizer exception.

The Poultry Defendants have extensively discussed the applicability of the "fertilizer exception" of CERCLA with respect to the application of poultry litter in the Watershed in the Poultry Defendants' Response to Plaintiffs' Motion for Summary Judgment and hereby incorporate same by reference as if fully set forth herein.

PROPOSITION V

TO THE EXTENT THAT PLAINTIFFS CAN ASSERT A CLAIM FOR RELIEF UNDER CERCLA (WHICH THE POULTRY DEFENDANTS ASSERT THEY CANNOT), SUCH A CLAIM MUST BE LIMITED TO A CLAIM FOR CONTRIBUTION. PLAINTIFFS CANNOT MAINTAIN A COST RECOVERY CLAIM UNDER CERCLA BECAUSE EACH IS A "POTENTIALLY RESPONSIBLE PARTY."

In the Motion, the Poultry Defendants advanced the argument that to the extent that Plaintiffs could proceed with a claim for relief under CERCLA, that claim must be in the form of a contribution claim pursuant to Section 113(f) rather than a cost recovery claim/indemnity claim pursuant to Section 107(a). As the Poultry Defendants pointed out in their Motion, a Section 107(a) cost recovery claim under CERCLA is available only where the plaintiff is not also a contributor to the pollution or contamination which necessitated the response actions. When the plaintiff is also a potentially responsible party with respect to the contamination or pollution at issue, the plaintiffs' only recourse under CERCLA is a contribution claim pursuant to Section 113(f). *See* 42 U.S.C. §§ 9607(a) and 9613(f); *see also Morrison Ent. v. McShares, Inc.*, 302 F.3d 1127 (10th Cir. 2002) (District court did not err in dismissing a Section 107(a) claim on summary judgment where plaintiff is a potentially responsible party and plaintiff may only proceed with an action for contribution under Section 113(f)). "Potentially responsible parties (PRP) who have contributed waste to the site are jointly and severally liable for cleanup costs, and are limited to seeking contribution from other PRPs." *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997).

Plaintiffs have not disagreed with the foregoing statement of the law, nor have they denied the fact that they have discharged phosphates directly into Lake Eucha and that they have mixed "contaminated water" from Lake Oolagah with water from Lakes Eucha and Spavinaw

prior to supplying that water to Tulsa residents. Nevertheless, Plaintiffs seem to argue that notwithstanding their admitted contribution of alleged pollutants to the very water supply for which they are now seeking damages there should be no reduction of damages based upon their contribution because their contribution was "*micro de minimis*". Plaintiffs arguments in this regard are misplaced. First, Plaintiffs offer absolutely no authority for the proposition that their status as a "potentially responsible party" is dependent upon the Poultry Defendants establishing some "significant" or "substantial" level of contribution by Plaintiffs. In fact, such an argument is directly contradictory to the authority cited by Plaintiffs in their Motion for Partial Summary Judgment on the Issues of CERCLA Liability wherein they have vigorously advanced the argument that liability under CERCLA is not dependent upon the "amount" of hazardous substances released. (*See,* Plaintiffs' Mot. Partial Summ. J. CERCLA Liability, pg. 18, (citing *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d. Cir. 1992)). Furthermore, even if the quantity of pollutants released by Plaintiffs was relevant, which it is not, the undisputed evidence in this case indicates that contrary to Plaintiffs' suggestion they have released a substantial amount of phosphates into the water supply.

Plaintiffs' attempts to characterize their phosphate contributions in the Watershed as "micro de minimis," "minisule," and "infinitesimally small" are misleading. Plaintiffs are attempting to trivialize their contribution of phosphates to the Watershed by only discussing activities with respect to their discharges of wastewater from their sewage lagoons at Eucha State Park directly in Lake Eucha. Plaintiffs fail to mention the land application of nearly 5,000,000 gallons of liquid sewage to the Watershed between 1992 and 1997. (*See,* Poultry Defendants' Response to Plaintiffs' Motion and Brief in Limine to Exclude Irrelevant and/or Prejudicial Evidence.) Mr. Costello's expert report does not even attempt to quantify that contribution.

Notwithstanding Mr. Costello's questionable and inadmissible opinion that Plaintiffs' sewage discharges have no "causal connection to algae blooms and resulting problems," it is irrefutable that Plaintiffs have contributed the same constituent which they allege the Poultry Defendants have contributed.[5] That fact alone under CERCLA makes Plaintiffs partially responsible parties and as such they can only pursue a claim of contribution. There is no dispute among the courts. A partially responsible party (PRP) may only proceed with an action for contribution under 42 U.S.C. 9613(f). *Morrison v. McShares, Inc.* 302 F.3d 1127, 1135 (10th Cir. 2002).

A fair reading of Plaintiffs' Response indicates that although they are not willing to admit to the validity of the Poultry Defendants' arguments regarding their inability to pursue a Section 107(a) cost recovery claim, they do not seriously dispute the Poultry Defendants' arguments in that regard. Plaintiffs' implied concession on this point is illustrated by their rather curious attempt to turn their Response into a late-filed motion in limine by asking the Court to exclude from the jury any evidence of Plaintiffs' contribution of pollutants. This unfounded request for exclusion has been addressed by Plaintiffs in their Motion in Limine filed herein. The Poultry Defendants have responded to that motion and their response is incorporated herein by reference.

PROPOSITION VI

ALL CLAIMS ASSERTED ON BEHALF OF TMUA SHOULD BE DISMISSED BECAUSE THE TMUA HAS NOT SUSTAINED AN INJURY IN FACT AND THEREFORE IS NOT A REAL PARTY IN INTEREST.

The heart of Plaintiffs' claims is that phosphates from land-applied poultry litter has migrated to Lakes Eucha and Spavinaw and caused injury. Accordingly, to maintain a cause of

[5] The inadmissibility of Mr. Costello's proferred opinions on this and a myriad of other topics is addressed in the Poultry Defendants' Motion in Limine to Exclude Testimony and Opinions of Benjamin Costello.

action, TMUA must have an ownership interest in Lakes Eucha and Spavinaw.[6] Plaintiffs argue that TMUA has standing because Tulsa leased its waterworks facilities to TMUA. However, Tulsa's lease of its waterworks facilities is insufficient to support standing of TMUA for several reasons. First, the lease does not pertain to Lake Eucha or Lake Spavinaw; the Lease clearly states that all land and equipment covered by the lease is located in Tulsa County, Oklahoma. Neither Lake Eucha or Lake Spavinaw is located in Tulsa County, Oklahoma, a fact of which the Poultry Defendants ask the Court to take judicial notice. Accordingly, the existence of the lease is immaterial, irrelevant, and insufficient for standing in this case.

Secondly, even if the lease could somehow be construed to include Tulsa's limited license in waters of Lakes Eucha and Spavinaw, Tulsa cannot lease a greater interest in the lakes than it has. Tulsa does not own Lake Eucha or Lake Spavinaw, the State of Oklahoma does.[7] The only interest Tulsa has is a limited license to use a predetermined amount of water from the lakes. Because such interest is insufficient to support claims of Tulsa, it is also insufficient to support claims by TMUA.

Thirdly, although Plaintiffs attempt to convince the Court that TMUA has sustained damages, the truth is that TMUA is nothing more than a department of Tulsa that happens to have a fancy title. Tulsa's former mayor and others testified that TMUA has no employees and that it receives its funding from Tulsa. Plaintiffs state that TMUA has an "operating fund" and that proves that they are independent of Tulsa. However, the exhibit referred to by Plaintiffs clearly states that *Tulsa* funded the operating fund. (*See*, Plaintiffs' Response to Poultry

[6] The arguments and authorities contained in Defendant City of Decatur's Motion for Summary Judgment and Brief in Support are incorporated herein.

[7] See Defendant City of Decatur's Motion for Summary Judgment and Brief in Support, p. 4, and Exhibit 1 thereto.

Defendants' Motion for Partial Summary Judgment, pg. 35, and Exhibit N thereto, document marked "TMUA002667.")

PROPOSITION VII

THE PLAINTIFFS CANNOT RECOVER DAMAGES FOR ANNOYANCE AND INCONVENIENCE PURSUANT TO THEIR NUISANCE CLAIM SINCE PLAINTIFFS ARE INCAPABLE OF SUFFERING EMOTIONAL INJURY.

From Plaintiffs' Reply (Proposition VII) it appears, at least in part, that Plaintiffs are trying to re-cast the Poultry Defendants' argument as asserting that Plaintiffs, as non-living beings, cannot assert a nuisance claim. This is not the issue raised by the Poultry Defendants' proposition here, rather, the issue is which type of damages are recoverable to these municipal entities, given that they are incapable, in both the legal and practical sense, of suffering personal injury. Plaintiffs acknowledge that entities of their type cannot suffer emotional injuries; therefore, since there are no facts in dispute, this issue is ripe for summary adjudication.

Contrary to Plaintiffs' contention, the Poultry Defendants are not dealing in semantics, and there is an abundance of authority to support the Poultry Defendants' proposition. The Oklahoma law of nuisance is clear. There are two types of injury that may be redressed if a nuisance is proven, that for injury to the property, and for injury to the person. The Oklahoma Supreme Court undertook an analysis of several of its prior decisions on this issue in *Truelock v. City of Del City*, 967 P.2d 1183 (Okla. 1998), and concluded:

> [These cases] make inescapable the conclusion that the cause of action for inconvenience, annoyance, and discomfort is one for personal injury and is separate and distinct than the cause of action for damages to property, although the right to both may arise in a suit for nuisance.

Id. at 1187; *see also* Plaintiffs' cited case of *Oklahoma City v. Eylar*, 61 P.2d 649, 650-51 (Okla. 1936) (drawing same conclusion and describing annoyance and inconvenience damages as being

for "physical discomfort"). Plaintiffs' attempt to cite antiquated authority from Arkansas to support their argument does not change the analysis; because, unlike their cited case, *Gus Blass Dry Goods Co. v. Reinman & Wolfort*, 143 S.W. 1087 (Ark. 1912), the Poultry Defendants are not challenging by way of this argument, Plaintiffs' right to seek the equitable remedy of abatement. What is clear here is that Plaintiffs' attempt to recover damages for personal injuries by way of their annoyance and inconvenience claims is not allowed, and should be stricken by the Court.

PROPOSITION VIII

PLAINTIFFS CANNOT SHOW EITHER AN EXPENDITURE ADDING TO THE PROPERTY OF ANOTHER OR AN EXPENDITURE WHICH SAVES THE POULTRY DEFENDANTS FROM EXPENSE OR LOSS AND AS SUCH CANNOT RECOVER ON A THEORY OF UNJUST ENRICHMENT.

Plaintiffs allege that they have "saved" the Poultry Defendants costs resulting from water treatment performed by Plaintiffs and as such the Poultry Defendants have been unjustly enriched. (*See*, Plaintiffs' Response, pg. 41.) The very core of a claim for unjust enrichment is a showing by the plaintiff that it has made an expenditure. That expenditure must add to property of another, or that expenditure must save the other from expense or loss. *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1518 (10th Cir. 1991). Contrary to Plaintiffs' assertion, the test is not simply has the Plaintiff conferred a benefit on the Defendant (which they have not,) the Plaintiffs must show an expenditure on their part which has saved the Defendants from expense or loss. Plaintiffs have not shown any expenditure made by them which has saved the Poultry Defendants from any expense which they were obligated to incur or any loss which they are obligated to sustain. Plaintiffs' argument is based on the illogical assumption that it is the Poultry Defendants' responsibility to treat the water which is supplied to Plaintiffs' customers. The treatment of Plaintiffs' Water Supply is Plaintiffs' responsibility, not the Poultry

Defendants, and any expenditure made with respect to Plaintiffs' Water Supply benefits Plaintiffs and logically does not save the Poultry Defendants from any expense or loss they are not obligated to incur or sustain.

Plaintiffs' attempt to revise their unjust enrichment claim by reference to Dr. Holmes' testimony that the Poultry Defendants saved $16 million by not exporting litter from the Watershed is equally unpersuasive. In this version of Plaintiffs' unjust enrichment claim, there is no expenditure by Plaintiffs. They did not pay to have litter exported and therefore cannot argue that they have "saved" the Poultry Defendants from any expense, nor has there been a "benefit" conferred upon the Poultry Defendants by an expenditure by Plaintiffs.

PROPOSITION IX

PLAINTIFFS' CLAIMS FOR JOINT AND SEVERAL LIABILITY AGAINST THE POULTRY DEFENDANTS PURSUANT TO THEIR CAUSES OF ACTION FOR NEGLIGENCE, NEGLIGENCE *PER SE* AND NUISANCE ARE BARRED BECAUSE PLAINTIFFS' OWN FAULT HAS CONTRIBUTED TO THE DAMAGES FOR WHICH THEY SEEK TO IMPOSE JOINT AND SEVERAL LIABILITY.

In the Motion, the Poultry Defendants sought a finding as a matter of law that because of their own fault (which has not been denied) Plaintiffs could not recovery damages jointly and severally from the Poultry Defendants under their causes of action for negligence, negligence *per se* and nuisance. In their Response, Plaintiffs correctly point out that they have recently moved to dismiss their negligence and negligence *per se* claims pursuant to a motion that has not yet been ruled upon this Court. In an act of apparent confidence in their ability to prevail on the motion to dismiss those claims or perhaps in recognition of the correctness of Defendants' joint and several arguments with respect to negligence and negligence *per se* claims, Plaintiffs have chosen to not even address the joint and several liability issues in the context of the negligence and negligence *per se*. Accordingly, if the Court denies Plaintiffs' Motion to Amend Pleadings

to Dismiss Negligence and Negligence *Per Se* Claims, the Poultry Defendants are entitled to a finding as a matter of law that any damages recovered by Plaintiffs pursuant to those causes of action must be assessed severally rather than jointly and severally.

While Plaintiffs have not challenged the Poultry Defendants' analysis of the joint and several liability issue in the context of the negligence and negligence *per se* claims, they have devoted a substantial portion of their Response to arguing that joint and several liability is available pursuant to their nuisance claim. Plaintiffs' entire argument on this issue is premised upon their position (articulated for the very first time in their Response) that they are pursuing an "intentional" nuisance claim. Once again, Plaintiffs are attempting to create a distinction that does not exist. Nuisance in Oklahoma is statutory. The Oklahoma Courts have not recognized a specific mental state requirement with regard to the cause of action of nuisance and have consistently permitted recovery under a claim of nuisance on facts which are more closely aligned with negligence principles as opposed to intentional tort principles. *See, City of Ada v. Canoy*, 177 P.2d 89 (Okla. 1947) (Where municipality installed sewer system which it believed to be adequate, but which proved to be inadequate, its continued operation constituted a nuisance for which the municipality was liable). Furthermore, Oklahoma's comparative negligence statute that applies to all actions when damage to property is alleged. 23 O.S. 1981 § 13.

Moreover, in the absence of any express authority under Oklahoma law on the issue of whether a plaintiff who is also at fault for the injury complained of can recover jointly and severally from defendants, the Poultry Defendants believe that this Court should look to the overwhelming authority from other jurisdictions. That authority is discussed at length in Section V(F) of the Poultry Defendants' Motion and in the interest of brevity is not recited herein again. Suffice it to say, that the Restatement of Torts 2d and the majority of courts to have considered

the issue have concluded that "[w]here the acts or omissions constituting negligence are the identical acts which allegedly gave rise to a cause of action for nuisance, the rules applicable to negligence will be applied." (*See*, 58 Am. Jur. 2d *Nuisances* § 72, p. 728; *see also*, Motion pg. 54-56 and cases cited therein.) Notwithstanding their recent attempts to distance themselves from the allegations of "negligence" contained in their own pleadings, it is inescapable that the "acts or omissions constituting negligence are the identical acts which allegedly gave rise to a cause of action for nuisance." Plaintiffs in this case plead the very same facts for their causes of action for negligence and nuisance. (*See generally* First Am. Compl. ¶¶ 47-52, 57-63). In fact, in the first two paragraphs of Plaintiffs' nuisance claim, they incorporate by reference the allegations of their negligence and negligence *per se* claims set forth previously in their complaint and refer expressly to "Defendants' wrongful conduct, as alleged above," another direct reference to the interrelationship between Plaintiffs' nuisance claim and their negligence claims. (*See* First Am. Compl. ¶¶ 47-48.)

Furthermore, even if Plaintiffs are permitted to recast the clear negligence based allegations of their nuisance claim under a late-adopted theory of "intentional nuisance," the evidence of Plaintiffs' fault in contributing "pollutants" remains relevant. Oklahoma law has consistently applied "contributory negligence" type defenses in the context of intentional torts to preclude a plaintiff from recovering where there is evidence that the plaintiff has intentionally committed illegal or unlawful acts. *See, e.g., Bowman v. Lunsford*, 54 P.2d 666 (Okla. 1936) (holding that where parties to unlawful or illegal transaction are *in pari delicto* with each other, each is estopped, as to the other, to take advantage of his own moral turpitude, illegal act, or criminal conduct to recover damages for injury sustained as a consequence of their joint wrong); *White v. Shawnee Milling Co.*, 221 P. 1029 (Okla. 1923) (If a party suffered injury while

violating a public law, he cannot recover for the injury from another transgressor if the unlawful act was a cause of the injury). It is undisputed that the Plaintiffs contributed to the very injuries upon which their claims in this case are based through intentional conduct knowingly pursued by Plaintiffs in direct violation of existing Oklahoma law. Plaintiffs' intentional and unlawful conduct is described expansively in Section V(B) of the Poultry Defendants' Motion. Through the unlawful operation of the Eucha Lagoons which led to a judgment against Plaintiffs reciting numerous findings of unlawful conduct and through their deliberate and knowing practice of mixing "contaminated" water from Lake Oologah with the water that Plaintiffs contend has been contaminated by the Poultry Defendants, Plaintiffs have, as a matter of law, contributed to the injuries and damages for which they now seek to impose liability upon the Poultry Defendants. As such, the Plaintiffs are jointly liable intentional wrongdoers, who at best, are only entitled to contribution. Accordingly, just as is the case with their negligence and negligence *per se* claims, Plaintiffs cannot recover jointly and severally from the Poultry Defendants under their nuisance claim.

CONCLUSION

For the foregoing reasons as well as those set forth in the Motion, this Court should enter summary judgment in favor of the Poultry Defendants on all claims for relief contained in Plaintiffs' First Amended Complaint. In the alternative, the Poultry Defendants are entitled to the entry of partial summary judgment in favor of: (i) dismissing the Plaintiffs' First Claim for Relief (Cost Recovery and Contribution Under CERCLA §§ 107 and 113), (ii) dismissing all claims asserted on behalf of Separate Plaintiff TMUA, (iii) dismissing the Plaintiffs' Third Claim for Relief (Nuisance) to the extent that such claim for relief seeks to recover damages for annoyance and inconvenience or other "emotional injuries," (iv) dismissing the Plaintiffs'

Seventh Claim for Relief (Unjust Enrichment), and (v) dismissing all claims for joint and several liability against the Poultry Defendants.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE CITY OF TULSA, et al.,)
)
Plaintiffs,)
)
-vs-) CASE NO. 01-CV-900-EA
)
TYSON FOODS, INC., et al.)
)
Defendants.)

TRANSCRIPT OF MOTIONS HEARING

HAD ON JANUARY 3, 2003

BEFORE THE HONORABLE CLAIRE V. EAGAN

UNITED STATES DISTRICT JUDGE

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trying to sell is basically the rule that says a bailor shall not be liable to third parties for the negligent use of the bail property by the bailee in the absence of control.

THE COURT: I know your argument.

MR. ROARK: Okay.

THE COURT: We don't have a negligence case.

MR. ROARK: That's right, we don't have a negligence claim. It's a nuisance claim. And there is plenty of control, as Mr. Kernan just went through here, to take it out of that rule. So -- and it's not a bailment in the first place because there's not a full transfer of possession of these chickens, given all the control issues. So there's lots of reasons why this is not a bailment and that argument doesn't apply.

THE COURT: Very well.

Okay. Mr. Tucker, are you going to address, does Cargill want to argue any standing or right to bring -- just one second. Are you going to address anything further that's in the Cargill briefs?

MR. JOHN TUCKER: The Cargill brief, yes, ma'am. It's actually separate from -- the Cargill brief raises two points that haven't been addressed in the summary judgment motion --

THE COURT: Right.

MR. JOHN TUCKER: -- of the joint defendants.

THE COURT: Right. You're going to reserve separate argument for that.

MR. TAYLOR: Well, Judge, I'm supposed to argue the TMUA standing aspect.

THE COURT: All right. Let me hear your reply on -- let's not belabor the PSA.

MR. GRAVES: I won't, Judge. I just wanted to point out that I didn't -- I want to point out again that I didn't stand up here and say that the act --

THE COURT: You didn't.

MR. GRAVES: -- expressly says that or anything of that nature, but given the act itself --

THE COURT: You said what he was going to say too. You told me that he was going to argue that there's nowhere in the act.

MR. GRAVES: Right. Given the act and the food safety regulations and things of that nature, there are reasons for these things that are in the contract that have to be there.

THE COURT: I understand.

MR. GRAVES: The other thing is on the Stevens case that he brought up, the Tyson versus Stevens case, that case related to swine, which is liquid manure first of all, which is a completely different thing than dry poultry litter, and the Packers and Stockyards Act did not apply to swine until this summer. So there was a reason why that argument wouldn't have been made in that particular case.

THE COURT: Thank you.

Mr. Taylor, it's your time.

MR. TAYLOR: Your Honor, if it please the Court, this is the simplest to understand and the simplest to apply the facts to the law, but it's often an area that courts are reluctant to sustain because of the practical impact that occurs.

TMUA does not own the water. The water is owned by the State of Oklahoma. And as a result, TMUA nor the City, and we'll let Mr. Tucker address that in a moment, have any standing with which to bring this lawsuit.

This lawsuit is brought over a body of water, or waters I should say, Spavinaw and Eucha, that are owned by the State of Oklahoma and that have been appropriated to the City since 1938.

Now, the TMUA does not have any employees. It is a public trust without employees, income, or expenses. That's from the former Mayor Susan Savage deposition and the Patsy Bragg deposition. It has no income. Its funds are provided to it by the City in an amount determined by the City Council. That's from the Susan Savage deposition as well. And then there's also language in the lease with the City that references certain real properties, none of which are located outside of Tulsa County in that particular reference to real properties.

But the core of it, Judge, comes to this. Imagine

this hypothesis: In your private office you have, if I remember correctly from your days as a magistrate, some very eclectic personal items. Those belong to the Honorable Claire Eagan personally.

THE COURT: Some of them.

MR. TAYLOR: Right. There are also items in your personal office that are allocated to you as a judge. Those are allocated to you either by the General Services Administration or by the Justice Department or, as this video screen says, U.S. Courts Oklahoma Northern District. Those are allocated but they are not your ownership.

Imagine that there is painting going on in your courtroom -- I'm sorry, in your office, and that in the course of that painting that you contend that there is paint that has gotten on your personal furniture and on that that is allocated to you by the Justice Department or by GSA. You personally have then an action against the painter, but you as the judge do not have an allocation -- have an action against the painter for what has been allocated to you. Only the entity that actually owns that, which would be either General Services Administration or the Justice Department, can bring that action.

The same is true here. There is no consideration for this allocation. The City of Tulsa and TMUA are political subdivisions, and the State of Oklahoma has the ownership

interest. And so they are -- the TMUA, and as Mr. Tucker will point out subsequently, the City of Tulsa are not the proper entities, do not have the standing.

That puts you in a very difficult position, because if you agree, you have to ultimately dismiss this case at this stage of the game, which is a very tough thing to do. But it's nevertheless what the facts applied to the law require you to do.

THE COURT: What about the cases and the statutes cited by the plaintiffs in their response?

MR. TAYLOR: Well, we think that the Okmulgee Coal case versus Hinton says that the real party in interest is the one legally entitled to the proceeds of a claim and that because those damages were, in that case were borne by the City, only the City is legally entitled. If this water is damaged, the owner of it is the one that must bring this action.

THE COURT: Under Oklahoma law, any person having a right to the use of water from a stream whose right is impaired by the act or acts of another or others may bring suit in district court.

MR. TAYLOR: But, Judge, we believe that that is the State of Oklahoma. Mr. Tucker is also going to address this with regard to the City.

TMUA, though, is what I'm here to address first and

foremost. There has been no allocation of this water from the state to the Tulsa Municipal Utility Authority. TMUA does not have the standing to bring the action. Mr. Tucker will address more specifically the City of Tulsa's claim.

THE COURT: Let's do TMUA then on behalf of the plaintiffs.

MR. McKINNEY: Your Honor -- pardon me. Do you want to do that?

MR. ROARK: Some of this will apply to Mr. Tucker. I'll wait and deal with some of that.

Of all the smoke screens that the defendants have thrown up in this case, I have to say that these two arguments that the TMUA and the City of Tulsa don't have a right to be in this court to protect their own drinking water is the most preposterous of any argument that they allege.

The TMUA, by lease agreement, and this is in Exhibit N to our attachments to the brief, has the responsibility to own, operate and protect all the assets of the water system in the city of Tulsa. They have an interest and a legal obligation to protect those rights. They contract to take care of the water system, they incur indebtedness to take care of the water system, and indeed they are the contracting party who incurred many of the costs that are at issue in this case. They contracted for the studies in the watershed. They run the water treatment plan, if you will.

Now, they have incurred the $4.1 million we're talking about. I don't know what other kind of standing or interest a party has to have to bring a lawsuit, but they've paid the bills.

The idea about ownership I'm going to reserve, because that's really probably more of what Mr. Tucker is going to talk about, as to who owns the water. But if you follow the defendants' argument to its conclusion, they would tell you that only the State of Oklahoma has the standing in this state to ever bring a nuisance claim for any pollution to any water body in the state of Oklahoma because they own all the waters of the state. Therefore, nobody else has a right to bring an action in nuisance.

That's preposterous. The case law would not bear that out. I don't know if they're suggesting that to you, but that's the conclusion you reach.

It's also not the law with respect to what it takes to bring a nuisance claim, both a private nuisance claim and a public nuisance claim, but I'm going to wait and deal with that after Mr. Tucker gives his presentation on this.

The example that Mr. Taylor gave you about the paint damage in your office on property is a little different because that would be an action for property damage, not a nuisance action. And there's a big difference about who can bring a nuisance action to protect the public's rights as well as your

own individual rights. Plenty of people besides the property owner can bring an action for a nuisance, particularly a public nuisance.

And again, I'm going to address that in a little more detail after Mr. Tucker speaks. But the idea that the TMUA is not a real entity and has no assets and is a hollow shell kind of corporation and can't be in front of you in this court is preposterous. They are a legal entity, a trust set up by law, and they're doing what they're obligated to do, which is to protect the water system that the defendants have polluted.

THE COURT: Thank you.

All right, Mr. Tucker.

MR. JOHN TUCKER: May it please the Court, Your Honor, John Tucker for Cargill and the other defendants on the issue of what does the City of Tulsa have a right to do and what do they not have a right to do in this court.

It's undisputed that Tulsa does not own the water in Spavinaw Lake or in Eucha Lake. It's undisputed and was confirmed by a court proceeding in 1938 that Tulsa acquired an allocation of an amount of water, an allocation of the right to draw and to impound and draw and take water from Spavinaw Creek. That allocation came to the City of Tulsa from the State of Oklahoma. The allocation is as to quantity. No reference is made in the allocation as to quality, merely as to a quantity of water which can be taken each year.

The City of Tulsa essentially has a water right that is a kind of right that is not a riparian right. It's not the right to use the land -- the water that crosses your land for purposes having to do with your land for domestic purposes. It is a right that was beyond that and beyond a riparian right that could only be obtained from the State of Oklahoma.

In the plaintiffs' response to our motion with regard to standing, the quicksand that you can get into if you aren't careful is set out at page 7 of their brief when they say in the last paragraph, "Interference with water rights is plainly an invasion of a legally protected interest." There's no objection about that. Clearly, interference with water rights is plainly an invasion of a legally protected interest.

They then say, "The common law of nuisance allows recovery, embodied under Title 50, allows recovery of damages for wrongful interference with one's use or enjoyment of rights or interests in land." Your Honor, we're not dealing with a right or an interest in land. We are dealing with a water right. It's a property interest, but it's not a possessory interest. It's not -- and I never was very good in Property I, but I think this is what they called having to have a right coupled with an interest.

They've got a right, but the right doesn't come from their land; it comes from the State of Oklahoma. And the right is limited to the right to take water. Here, Tulsa's protected

interest is the right to take water, which is not a possessory interest. The City is not the riparian owner of that amount of the water.

And I know Your Honor will recall from other briefing that was presented in this matter the Department of Environmental Quality charged the City of Tulsa with violations having to do with its intentional discharge from its sewage lagoons at Lake Eucha. The action that was brought by ODEQ was to protect the waters of the state, which is Lake Eucha, and that's where their authority came from to levy that charge.

And the whole point we're raising, whether you talk about the City of Tulsa or TMUA, is that nothing is alleged that the City's right to take water has been interfered with, and there's no basis for any cause of action for interference with the right to take water that was allocated to the City.

THE COURT: Thank you.

MR. JOHN TUCKER: Thank you.

THE COURT: Mr. Roark.

MR. ROARK: Your Honor, a fair reading of the permit and order issued by the Oklahoma Resources Planning Board in 1938 cannot be read any other way but to say that the appropriative rights that that gave the City of Tulsa to take this water clearly gave it possession of the water, if it did not give it title to the water. They have been using and appropriating the water ever since.

The idea that there's some distinction between the law that we cite under nuisance law that talks about possession of land and what we're talking about here, water rights, they don't cite any case law that draws this distinction, the dichotomy between water and land and nuisance applies to land but it doesn't apply to water.

The rights of -- this is both a private nuisance and a public nuisance. The plaintiffs, to the extent they have a private nuisance, they have a special interest because they've incurred, the cities and TMUA have incurred the $4.1 million. That makes it a private nuisance. As to those entities, they have paid the bill.

When you talk about private nuisance, the law is clear and the Restatement is clear, the case law in Oklahoma is clear that you don't have to have title. You can bring it with a mere possessory interest. They don't quote any law to the contrary. There is no law to the contrary. It's as old as the law can be. So a mere possessory interest is sufficient to bring a private nuisance.

When we talk about public nuisance, an action is brought for the benefit of the public and you don't have to bring -- you don't have to be the owner of the property to bring a public nuisance. Indeed, the law is old, and there's both Arkansas law we cite and Oklahoma law, that a municipality is indeed the proper party to bring an action for a nuisance, a

public nuisance, that is injurious to the citizens of that municipality.

That's what's going on here. The idea that the City of Tulsa cannot bring a public nuisance action to protect its citizens from its own public water drinking supply is preposterous, it's absurd, but that's what the defendants are suggesting.

We have rights under four statutes: the water law rights under Title 82, the environmental laws under 27A, the public nuisance laws under Title 50, the municipal law that we brought a claim on that prevents the pollution of a public water supply. All of those statutes give special rights to the plaintiffs in this case to protect their water supply, and there's simply no question but that they've got the right to be plaintiffs in this case.

THE COURT: Thank you.

All right. Now do we want to go to Peterson, City of Decatur, or any other issues that have been briefed?

MR. JOHN TUCKER: Joint and several liability was also briefed in the joint motion for summary judgment. With the Court's permission, I would like to address that.

THE COURT: Certainly.

MR. JOHN TUCKER: This matter began, as the Court will recall, as an action that had a number of causes of action alleged, one of which was negligence.

AFFIDAVIT OF J.D. STRONG

J.D. Strong, being of lawful age and first being sworn upon his oath, deposes and states as follows:

1. I am the Secretary of the Environment of the State of Oklahoma. I am also the trustee for natural resources for the State of Oklahoma under CERCLA.

2. I have personal knowledge about the natural resources in that portion of the Illinois River Watershed located within Oklahoma, as well as the agencies that exercise regulatory, control and management functions over such natural resources on behalf of the State of Oklahoma. These agencies include, without limitation, those listed below.

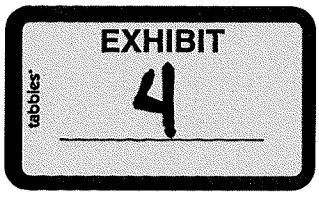
3. The State of Oklahoma acting through the Oklahoma Department of Environmental Quality conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Regulation of municipal and industrial point source discharges. 27A Okla. Stat. § 1-3-101(B)(1);

b. Surface water and groundwater quality and protection and water quality certifications. 27A Okla. Stat. § 1-3-101(B)(4);

c. Regulation of public and private water supplies. 27A Okla. Stat. § 1-3-101(B)(6).

4. The State of Oklahoma, acting through the Oklahoma Water Resources Board, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:



a. Jurisdiction for water quantity, including but not limited to, water rights, surface water and underground water, planning, and interstate stream compacts. 27A Okla. Stat. § 1-3-101(C)(1).

b. Flood plain management. 27A Okla. Stat. § 1-3-101(C)(4).

c. Dam Safety. 27A Okla. Stat. § 1-3-101(C)(3).

d. Water Quality Standards development and accompanying use support assessment protocols, anti-degradation policy and implementation, and policies generally affecting Oklahoma Water Quality Standards application and implementation, including but not limited to, mixing zones, low flows and variances or any modification or change thereof pursuant to Section 1085.30 of Title 82 of the Oklahoma Statutes. 27A Okla. Stat. § 1-3-101(C)(9).

5. The State of Oklahoma, acting through the Oklahoma Department of Wildlife Conservation, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Investigating wildlife kills. 27A Okla. Stat. § 1-3-101(H)(1).

b. Wildlife protection and seeking wildlife damage claims. 27A Okla. Stat. § 1-3-101(H)(2).

c. Issuing fishing licenses. 29 Okla. Stat. § 4-110.

d. Issuing hunting licenses. 29 Okla. Stat. §§ 4-101,112

e. Closing the waters of the State to fishing. 29 Okla. Stat. § 6-502.

6. The State of Oklahoma, acting through the Oklahoma Scenic Rivers Commission, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Promulgating rules and issuing orders necessary to protect the public interest. 82 Okla. Stat. § 1461(G)(b).

b. Establishing fees for commercial canoe operators. 82 Okla. Stat. § 1470.

c. Acquiring, developing and maintaining public access points. 82 Okla. Stat. § 1454.

d. Protecting the natural resources of the Scenic Rivers in the Illinois River Watershed. O.A.C. 630:15-1-1.

7. The State of Oklahoma, acting through the Oklahoma Department of Mines, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Mining regulation. 27A Okla. Stat. § 1-3-101(G)(1).

b. Inspecting surface mining operations. 45 Okla. Stat. § 907.

c. Reviewing and issuing surface mining permits. O.A.C. § 460:10-3-4.

8. The State of Oklahoma, acting through the Oklahoma Department of Agriculture, Food, and Forestry, conducts regulatory, control and management functions in that portion of the Illinois River Watershed located within Oklahoma including, without limitation, the following:

a. Registering and regulating poultry feeding operations. 2 Okla. Stat. § 10-9.1, et seq.

b. Certifying poultry waste applicators. 2 Okla. Stat. § 10-9.16, et seq.

c. Regulating concentrated animal feeding operations. 2 Okla. Stat. § 20-40 et seq.

Further affiant sayeth not.

J.D. Strong
Oklahoma Secretary of the Environment

Dec. 15, 2008
Date

Subscribed and sworn to before me this 15th day of December, 2008.

Notary Public

JOYCE K. BOYD NOTARY # 02017963 EXP. 11/09/10 PUBLIC STATE OF OKLAHOMA

My Commission Expires: 11-9-10

My Commission No. 02017963